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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS AND RAYMOND FREDERICK CLARK, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 19, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS AND RAYMOND FREDERICK CLARK, PETITIONERS,

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Comm #11200

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT—Filed September 5, 1956

State of Oregon,
County of Multnomah, ss.:

I, Ronald E. Sherk, being first duly sworn, depose and say that I am a Special Agent for the Federal Bureau of Investigation and reside at Portland, Oregon; that heretofore, on May 22, 1956, in the State and District of Oregon, I listened to portions of electronic tape recordings of conversations, which recordings contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, Section 605, U.S.C.A. I am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one Minifon recording machine and four spools of Minifon recording machine wire, which said properties containing evidence of such recorded intercepted telephone conversations are located in Safety Deposit Box 912 at The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive they are so situated.

Ronald E. Sherk

Subscribed and sworn to before me this 5th day of September, 1956.

Claire Mundorff, United States Commissioner.

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Comm #11200

SEARCH WARRANT—Filed September 5, 1956

To: Ronald E. Sherk, Special Agent, Federal Bureau of Investigation, or any other authorized Special Agent of the F. B. I.

Affidavit having been made before me by Ronald E. Sherk, Special Agent of the Federal Bureau of Investigation, that he is positive that on the premises known as The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon, in Safety Deposit Box 912 of said bank, there is now being concealed certain property, namely five (5) electronic tape recordings, one (1) Minifon recording machine, and four (4) spools of Minifon recording machine wire, which properties are believed by the said Ronald E. Sherk to contain intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, Section 605, U.S.C.A., and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist;

You Are Hereby Commanded to search forthwith the place named for the properties specified, serving this warrant and making the search at any time in the day or night, and if the properties be found thereto seize the same, leaving a copy of this warrant and a receipt for the properties taken, and prepare a written inventory of the properties seized and return this warrant and bring the properties before me within ten days of this date, as required by law.

Dated this 5th day of September, 1956.

Claire Mundorff, United States Commissioner.

[fol. 2a] I have received the attached search warrant Sept. 5, 1956 and have executed it as follows:

On September 5, 1956, at 3:15 pm o'clock, I searched the premises described in the warrant and I left a copy of the warrant with Robert Franz, Manager, First State Bank of Milwaukie, at the place of search, together with a receipt for the items seized.

The following is an inventory of the property taken pursuant to the warrant:

5 electronic tape recordings

1 Minifon recording machine

3 spools of Minifon recording machine wire.

This inventory was made in the presence of J. Eldon Dunn, Special Agent, FBI, Portland, Ore. and Capt. Vayne M. Gurdane, Oregon State Police, Milwaukie, Oregon.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Ronald E. Sherk

Subscribed and sworn to and returned before me this 5th day of September, 1956.

Claire Mundorff, U. S. Commissioner.

[fol. 3] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

C-18321

UNITED STATES OF AMERICA,

v.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Defendants.

INDICTMENT FOR VIOLATIONS OF SECTION 371, TITLE 18, USC; AND SECTIONS 501 AND 605, TITLE 47, USC—Filed February 4, 1957

United States of America,
District of Oregon, ss.:

The Grand Jurors of the United States of America for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations do find, charge, allege and present:

Count I

1. That from on or about the 1st day of August 1955 and continuously thereafter up to and including the Month of July 1956, in the District of Oregon, James Butler Elkins and Raymond Frederick Clark, the defendants herein, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together and with each other and with diverse other persons whose names are to the Grand Jury unknown, to commit certain offenses against the United States of America, to-wit: to intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications, in violation of Title 47,

Sections 501 and 605, USC; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (18 USC 371).

2. It was a part of the conspiracy that the defendants would have a recording device installed in Apartment 503 of the King Tower Apartments located at 901 SW King Avenue, Portland, Oregon, and that this recording device would be connected to lines intercepting the telephone wires of Thomas E. Maloney while the said Thomas E. Maloney had a telephone in his apartment, which apartment was [fol. 4] numbered 502, at King Tower Apartments, 901 SW King Avenue, Portland, Oregon.

3. It was further part of said conspiracy that defendant James Butler Elkins would employ the said Raymond Frederick Clark and others whose names are to the Grand Jury unknown, to intercept the telephone conversations of Thomas E. Maloney and others, and between others, carried on the telephone line of the said Thomas E. Maloney, and record the same, without the authority of the persons whose conversations were being thereby transmitted.

4. It was further a part of the conspiracy that the said recordings of said telephone conversations would be delivered to and possessed by the defendants, James Butler Elkins and Raymond Frederick Clark.

5. It was further a part of the said conspiracy that the defendants, James Butler Elkins and Raymond Frederick Clark, would play back the recordings and that the defendant James Butler Elkins would divulge the existence and contents of the intercepted conversations between Thomas E. Maloney and others, and between others, carried on the line of the said Thomas E. Maloney, to other persons.

Overt Acts

(1) In pursuance of said conspiracy and to effect the objects thereof, the defendant James Butler Elkins, in the State and District of Oregon, directed James Q. Jenkins to purchase for said James Butler Elkins, recording equipment and supplies therefor.

(2) And further in pursuance of said conspiracy and to effect the objects thereof, the defendant James Butler Elkins, on or about August 1, 1955, in the State and District of Oregon, persuaded Thomas E. Maloney to occupy an apartment at said King Tower Apartments in Portland, Oregon.

(3) And further in pursuance of said conspiracy and to effect the objects thereof, the defendant James Butler Elkins, on or about August 5, 1955, in the State and District of Oregon, directed Bernard Kane to rent an apartment on the fifth floor of the said King Tower Apartments, near Apartment 502, in Bernard Kane's name, and deliver the keys to said James Butler Elkins.

(4) And further in pursuance of said conspiracy and to effect the objects thereof, the defendants James Butler Elkins and Raymond Frederick Clark, with assistance of [fol. 5] persons whose names are to the Grand Jury unknown, did, in August 1955, in the State and District of Oregon, place a recording device in Apartment 503 of the King Tower Apartments, 901 SW King Avenue, Portland, Oregon.

(5) And further in pursuance of said conspiracy and to effect the objects thereof, the defendant James Butler Elkins, in or about November 1955, in the State and District of Oregon, went to the home of William M. Langley and divulged to said William M. Langley the existence of said intercepted conversations, or some of them, and showed to said William M. Langley a paper or papers on which transcripts of some of said intercepted wire-transmitted conversations appear.

(6) And further in pursuance of said conspiracy and to effect the objects thereof, the defendant James Butler Elkins, in or about November 1955, in the State and District of Oregon, took to the home of Mrs. Janice Langley, a recording machine and played a recording machine in the presence of Mrs. Janice Langley at 2704 SW English Lane, Portland, Oregon.

(7) And further in pursuance of said conspiracy and to effect the objects thereof, the defendant James Butler

Elkins, during the Year 1955, the exact date being to the Grand Jury unknown, in the State and District of Oregon, took a recording machine to the home of Clyde C. Crosby at 3815 SE Alder Street, Portland, Oregon, and then and there divulged the existence of said intercepted communications to said Clyde C. Crosby and published the contents of such intercepted communications, or some of them, by playing recordings thereof in the presence of said Clyde C. Crosby.

(8) And further in pursuance of said conspiracy and to effect the objects thereof, the defendant Raymond Frederick Clark, during May 1956, in the State and District of Oregon, did possess at his residence at 2409 SE Main Street, Portland, Oregon, recording equipment, spools of tapes and wire for use thereon, and did possess and knowingly, wilfully and unlawfully then and there conceal tapes upon which were recorded the said intercepted conversations, or some of them, the said Raymond Frederick Clark then and there well knowing that the said tapes contained recordings of intercepted wire communications recorded in [fol. 6] pursuance of said conspiracy; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (All in violation of Section 371, Title 18, USC).

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count II

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, on or about August 23, 1955 in the District of Oregon, did knowingly, wilfully and unlawfully, without authority of the senders thereof, intercept and record or cause to be intercepted and recorded, wire communications between William M. Langley and Thomas E. Maloney, and divulge or cause to be divulged the existence of such intercepted communications to others, to-wit: William M. Langley, Clyde C. Crosby and others whose names are to this Grand Jury unknown; contrary to the form of the statute in such case made and provided and

against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count III

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, on or about September 14, 1955, in the District of Oregon, did knowingly, wilfully and unlawfully intercept or cause to be intercepted, a wire communication between Thomas E. Maloney, communicating from the State and District of Oregon, to one "Joey" McLaughlin in Seattle, in the State of Washington, the same being an interstate communication by wire, and the said James Butler Elkins and Raymond Frederick Clark did so intercept the said communication or cause to be intercepted the said communication, without being authorized by the senders thereof, and did use the same for their own benefit or for the benefit of another not entitled thereto; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

[fol. 7] And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count IV

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, on or about September 15, 1955, in the District of Oregon, did wilfully, knowingly and unlawfully intercept or cause to be intercepted, without authority of the senders, a wire communication between Thomas E. Maloney at Portland, Oregon and Rickie Maloney in Spokane, Washington, and did thereafter knowingly divulge and publish the existence of such intercepted wire communication to Clyde C. Crosby and others whose names are to the Grand Jury unknown, and did use the same for his or their own benefit and the benefit of others not entitled thereto; contrary to the form of the statute in such case made and provided and against the peace and dignity

of the United States of America. (Sections 501 and 605, Title 47, USC).

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count V

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, on or about September 15, 1955, in the District of Oregon, being then and there persons not authorized by the senders, did knowingly, wilfully and unlawfully intercept or cause to be intercepted, wire communications between Thomas E. Maloney and Thomas Sheridan, and said James Butler Elkins did thereafter divulge and cause to be divulged the existence, contents, substance, purport, effect and meaning of such intercepted communications, to William M. Langley and to Clyde C. Crosby and to other persons whose names are to this Grand Jury unknown, and use the same for the benefit of the said James Butler Elkins and others not entitled thereto; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

[fol. 8] And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count VI

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, in or about August or September of 1955, in the District of Oregon, did knowingly, wilfully and unlawfully intercept or cause to be intercepted, a wire communication between Thomas E. Maloney and William M. Langley, not then and there being authorized by the senders to intercept said communication, and the said James Butler Elkins having become acquainted with the contents, substance, purport, effect and meaning of the same and knowing that the said information was so obtained, did thereafter unlawfully divulge and publish the existence, contents, substance, purport, effect and meaning

of the said intercepted wire communication and parts of said intercepted wire communication, to Mrs. Janice Langley and to other persons whose names are to this Grand Jury unknown, and use the same for the benefit of the said James Butler Elkins and the benefit of other persons not entitled thereto; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count VII

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, on or about September 15, 1955, in the District of Oregon, did, not being authorized by the sender so to do, knowingly, wilfully and unlawfully intercept and cause to be intercepted, a wire communication or wire communications between Thomas E. Maloney and William M. Langley, and the said James Butler Elkins did thereafter, having become acquainted with the contents, substance, purport, effect and meaning of such communication or communications and parts thereof, and knowing that such information was so obtained, divulge and publish the existence, contents, substance, purport, effect and meaning of such communication or communications or parts thereof, to William M. Langley and 6 others whose names are to [fol. 9] the Grand Jury unknown, and did use the same for his own benefit and for the benefit of another not entitled thereto; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count VIII

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, in or about September 1955,

in the District of Oregon, did, without the consent of the senders thereof, knowingly, wilfully, unlawfully intercept and cause to be intercepted, a wire communication between Thomas E. Maloney, in Portland, Oregon, and Joseph McLaughlin in Seattle, Washington, and said James Butler Elkins, having become acquainted with the contents, substance, purport, effect and meaning of the same, did divulge and publish the existence, contents, substance, purport, effect and meaning of the same, or part thereof, to William M. Langley, knowing that such information was so obtained, and did use the same for his own benefit or for the benefit of another not entitled thereto; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count IX

That James Butler Elkins and Raymond Frederick Clark, the defendants above-named, in or about August 1955, in the District of Oregon, did knowingly, wilfully and unlawfully, without being authorized by the senders thereof, intercept and cause to be intercepted, a wire communication between William M. Langley and Dorothea Anderson, and did divulge and publish and cause to be divulged and published, the existence, contents, substance, purport, effect and meaning of such intercepted wire communication, to William M. Langley and to Clyde C. Crosby and to other persons whose names are to this Grand Jury unknown; [fol. 10] contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC).

Dated at Portland, Oregon, this 4th day of February 1957.

A True Bill.

E. C. Laws, Foreman, United States Grand Jury.

C. E. Luckey, United States Attorney, District of Oregon.

[fol. 12]

SECRET B. W.

No. .....

UNITED STATES DISTRICT COURT

..... DISTRICT OF OREGON

..... DIVISION

THE UNITED STATES OF AMERICA

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Defendants.

INDICTMENT

for Violations of 18 USC 371 and 47 USC 501 and 605

A true bill,

E. C. Laws
Foreman.

Filed in open court this ..... day of February, A.D. 1957.

.....
Clerk.

Bail, $5000 Elkins
$3000 Clark

C. E. LUCKEY
C. E. Luckey, U. S. Attorney

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

C-18.321

UNITED STATES OF AMERICA,

v.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Defendants.

MOTION FOR RETURN OF SEIZED PROPERTY AND SUPPRESSION OF EVIDENCE—Filed March 25, 1957

Come now the defendants, James Butler Elkins and Raymond Frederick Clark, by and through their attorneys, and move this Court for its Order directing that certain property of which defendants herein are the owners, a schedule of which is annexed hereto and made a part hereof, as fully as if set forth herein, and which, late in the evening of the 17th day of May, 1956, at the premises known as 2409 S. E. Main Street, Portland, Multnomah County, Oregon, in this District, were unlawfully searched for, seized and taken from defendants by Terry D. Schrunk, then sheriff of Multnomah County, Oregon, and certain deputies, to-wit, George Miniely, Richard Sacanto, Arthur Heem, Hal Lynn, and Garth Stackhouse, and divers other persons, which property was subsequently, by Order of the District Court of Multnomah County, Oregon, declared to have been illegally searched for, seized and taken, and that thereafter, on or about the 5th day of September, 1956, Ronald E. Sherk, an agent of the Federal Bureau of Investigation, and other agents of the Federal Bureau of Investigation, whose names are unknown to the defendants herein, acting under a purported search warrant, unlawfully searched for, seized and took into their possession, said property, and that said property be suppressed as evidence against these defendants and each of them in this and any other criminal proceedings against them, or each of them.

The defendants, in arguing the foregoing motion, will rely [fol. 14] upon the following propositions, and upon a memorandum of points and authorities to be submitted to the Court prior to the argument on this motion, to-wit:

a) That the search warrant used by the Sheriff of Multnomah County in the original seizure of said property was invalid, illegal and void, and that it has been so held by appropriate ruling of the Courts of the State of Oregon, and that thus said property cannot be used against the defendants, or either of them as evidence in this or any other criminal proceeding;

b) That the search warrant used by said agent or agents of the Federal Bureau of Investigation on September 5, 1956, in seizing said property is and was invalid, illegal and void in that it is and was based upon an insufficient affidavit of one Ronald E. Sherk, an F.B.I. agent, and hence said affidavit was illegal, invalid and void, and there was not, therefore, probable cause for the issuance of said warrant;

c) That in the event this Court should rule that an affidavit and search warrant, or either of them as the basis for seizure by the Federal Bureau of Investigation agents on September 5, 1956, were valid, nonetheless, such evidence should be suppressed because the illegality, invalidity and voidness of the original seizure by the state authorities renders such evidence illegal, regardless of the manner in which the Federal authorities later obtained the same and deprives defendants, and each of them, of their rights under the Fourth Amendment and under the due process clause [fol. 15] of the Fifth Amendment to the Federal Constitution;

d) That the State and County officers, in making the unlawful search and seizure did not do so for any pretense of enforcing the state or municipal law, but solely for the purpose of permitting and encouraging a prosecution in the Federal Courts for the commission of a crime against the United States; which search and seizure could not have legally been made

in the first instance, either by the State or by the United States.

e) That the property seized was in the custody of the Courts of the State of Oregon and this Court (U.S.) had no jurisdiction to seize the same.

This motion is supported by affidavits to be filed pursuant to Rule 45(d) F.R.Cr.P.

Wm. J. Crawford, Burton J. Fallgren, Attorneys for Defendants.

State of Oregon,
County of Multnomah, ss.:

I, Wm. J. Crawford, one of the attorneys for defendants, do state that in my opinion the foregoing motion is well founded in law, and I state that the same is made in good faith and is not interposed for the mere purpose of delay.

Wm. J. Crawford, Of Attorneys for Defendants.

Wherefore, pursuant to Rule 41(e) of F.R.Cr.P., defendants move this Court for its further Order setting a time and place for the hearing of the foregoing Motion, and per-
[fol. 16] mitting the defendants to introduce testimony thereat in support of the contentions made in this Motion.

Wm. J. Crawford, Of Attorneys for Defendants.

[fol. 17] SCHEDULE OF PROPERTY SEIZED

1. 5 Electronic Tape Recordings
2. 1 Minifon Recording Machine
3. 3 Spools of Minifon Recording Machine Wire

[fol. 18] State of Oregon,
County of Multnomah, ss.:

Due service of the within Motion for Return of Seized Property and Suppression of Evidence is hereby accepted in Portland, Multnomah County, Oregon this ..... day of March, 1957, by receiving a copy thereof, duly certified

to as such by Wm. J. Crawford, of Attorneys for Defendants.

.....

State of Oregon,
County of Multnomah, ss.:

I, Wm. J. Crawford, of attorneys for defendants, do hereby certify that I served the within Motion for Return of Seized Property and Suppression of Evidence on or about 4:50 P. M. March 22, 1957, by personally handing to C.E. Luckey, United States Attorney, in his office in the U.S. Courthouse, Portland, Oregon, two copies of the within motion certified to by me to be true and correct copies of the said Motion to Suppress, etc.

Wm. J. Crawford, Of attorneys for Defendants.

[fol. 19] [File endorsement omitted]

No. C-18321

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS—Filed March 26, 1957

State of Oregon,
County of Multnomah, ss.:

I, William J. Crawford, being first duly sworn, on oath depose and say as follows:

I

That I am one of the attorneys for the defendants, and this affidavit is made in support of Defendants' Motion to Suppress, heretofore filed herein.

II

That on or about the 17th day of May, 1956, at about 10:30 P.M. in the evening of said day, the Sheriff for Multnomah County, Oregon, acting in person, as well as by and through several of his deputies, and accompanied by Arthur B. Williams and Doug Baker, reporters for the Oregon

Journal, entered the premises at 2809 S. E. Main Street, Portland, Oregon, based upon a purportedly valid search warrant based upon a purportedly valid affidavit therefor, which affidavit had been sworn to by Wm. M. Langley, District Attorney for Multnomah County, Oregon. That certified copies of said affidavit and warrant, marked Exhibits A and B, are attached hereto and incorporated herein by reference thereto as fully as if set forth therein.

III

That said Sheriff and deputies, after said entry upon said premises, seized certain articles of property, a complete list of which is purportedly contained in the return of said [fol. 20] warrant made by George Minielly, Deputy Sheriff for Multnomah County, a certified copy of which is marked Exhibit C and is attached hereto and incorporated by reference herein as fully as if set forth herein.

IV

That thereafter, and on or about the 29th day of May, 1956, upon motion of Raymond L. Clark, (defendant herein and movant therein) and others, Hon. John Mears, Judge of the District Court for Multnomah County, Oregon, (who issued said warrant), held said search and seizure illegal, invalid and void by an order duly made and entered in said Court, a certified copy of which is marked Exhibit "E", attached hereto and made a part hereof as fully as if set forth herein; that said order provided that some of said items so seized should remain in the custody of the State of Oregon, by being turned over to Robert Y. Thornton, Attorney General for the State of Oregon.

V

That on or about the 22nd day of May, 1956, James B. Elkins and Raymond F. Clark, defendants herein, were indicted by the Multnomah County, Oregon, Grand Jury for the May, 1956, term; that said defendants Elkins and Clark, on or about the ..... day of August, 1956, moved that said items so seized should be suppressed in connection

with said indictment; that Hon. Frank J. Lonergan, Judge of said Circuit Court, wherein said indictment was pending, on or about the 17 day of September, 1956, after declaring said search and seizure to be illegal, invalid and void, ordered some of said property to remain in custody of the Court, a copy of which ruling is marked Exhibit "F", attached hereto and made a part hereof as fully as if set forth herein.

VI

That I am informed and believe and therefore aver that for custodial purposes, said Attorney General placed said items of property in the custody of the Oregon State Police; that, similarly, I am informed and believe that the State Police, for purposes of retaining custody thereof, placed said items in a vault at the First State Bank of Milwaukie, [fol. 21] Oregon, at 1036 Main Street, Milwaukie, Oregon, and that said items were so stored until on or about the 5th day of September, 1956.

VII

That on or about the 5th day of September, 1956, Ronald E. Sherk, a Special Agent of the Federal Bureau of Investigation, executed an affidavit for a search warrant for the seizure of said items so stored at said Bank by the State of Oregon, through its courts; that based thereon, Claire Mundorff, the United States Commissioner, issued a search warrant for the search and seizure of said property. That said Ronald E. Sherk executed said warrant and seized certain items, and made a return thereof to said Commissioner. That copies of said affidavit, warrant and return are marked Exhibits "G-1", "G-2" and "G-3", attached hereto and made a part hereof as fully as if set forth herein.

VIII

That I am informed and believe that the items so seized by said Ronald E. Sherk by the use of said Search Warrant, were examined by the Federal Grand Jury at its sessions commencing on or about January 9, 1957, and continuing from time to time to on or about the 4th day of February,

1957; that I am further informed and believe and therefore allege that the indictment herein was based upon said items so seized.

IX

That a hearing should be held by this Court, for the purposes of examining witnesses relevant to the validity of said searches and seizures, and for the purpose of permitting these defendants to adduce testimony in support of their Motion to Suppress, filed herein.

Wm. J. Crawford, Of Attorneys for Defendants.

Subscribed and sworn to before me this 26th day of March, 1957.

Burton J. Fallgren, Notary Public for Oregon.
My Commission Expires: 9/21/57

[fol. 22] Wherefore, Defendants renew their Motion to this Court, for its Order setting a time and place for a hearing on said Motion to Suppress.

Wm. J. Crawford, Of Attorneys for Defendants.

State of Oregon,
County of Multnomah, ss.:

Due service of the within Affidavit in Support of Motion to Suppress is hereby accepted in Multnomah County, Oregon, this 26th day of March, 1957, by receiving a copy thereof, duly certified to as such by William J. Crawford, of Attorneys for Defendants.

C. E. Luckey, United States Attorney.

[fol. 23] State of Oregon,
County of Multnomah, ss.:

I, Si Cohn, County Clerk and Ex-officio Clerk of the Circuit Court of the State of Oregon, in and for the County of Multnomah, do hereby certify, that John F. Gantenbein, is one of the duly elected, qualified and acting District Judges of the District Court of the State of Oregon, in and

for the County of Multnomah, and was at the time of signing the foregoing Certificate of Attestation, the Presiding Judge of said Court, and that said Attestation is in due form of law and by the proper officer.

I further certify, that Elmer Bennett is the duly elected and qualified Clerk of the District Court of the State of Oregon, in and for the County of Multnomah, and legal custodian of the records of said Court and was at the time of signing the foregoing Certificate of Attestation, Clerk of said Court, and that said Certificate is in due form of law and by the proper officer.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 26 day of March A.D. 1957.

(Seal)

Si Cohn, County Clerk, Multnomah County Oregon,
By Earle W. Benton, Chief Deputy, County Clerk
and Ex Officio Clerk of the Circuit Court of the
State of Oregon, Multnomah County.

[fol. 24]

EXHIBIT "A" TO AFFIDAVIT OF WILLIAM J. CRAWFORD

IN THE DISTRICT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

AFFIDAVIT—Filed May 21, 1956

STATE OF OREGON)
: ss.
County of Multnomah)

I, WILLIAM M. LANGLEY, being first duly sworn, upon oath, depose and say, upon information and belief that there is in the possession of Raymond Clark in a certain building situated on premises occupied by and under the control of the said Raymond Clark at or about 2409 S. E. Main Street, in the City of Portland, County of Multnomah, State of Oregon, certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to Exhibit said photographs.

I further depose and say that the said Raymond Clark is in possession of the aforesaid obscene and indecent photographs with accompanying sound recordings with intent to use in violation of O.R.S. 167.150, i.e., possession of obscene pictures with intent to exhibit them.

I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon.

WHEREFORE, the above named Court is respectfully requested to issue a search warrant for the search of the said premises for said obscene and indecent photographs with accompanying sound recordings and for the seizure of same, and this affidavit is made pursuant to may duty under Chapter 8, Oregon Revised Statutes.

(sgd) William M. Langley

SUBSCRIBED and sworn to before me this 17th day of May, 1956.

(sgd) J. R. Mears
Judge.

[fol. 25]

EXHIBIT "E" TO AFFIDAVIT OF WILLIAM J. CRAWFORD

IN THE DISTRICT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, on the relation of WILLIAM M. LANGLEY,
Plaintiff,

vs.

RAY CLARK,
Defendant,

and

SONNY MARTIN,
Ancillary Defendant.

ORDER DECLARING SEARCH WARRANT A NULLITY AND IMPOUNDING SUPPRESSED EVIDENCE—May 29, 1956

The above entitled matter came on especially for hearing, Monday, May 21, 1956, upon a motion to suppress evidence

and return or destroy seized goods tendered by the defendant Ray Clark and a similar motion tendered by the ancillary defendant Sonny Martin. The District Attorney, relator herein, asked for one week delay. The court allowed twenty-four hours.

The relator and the State of Oregon was represented by Oscar D. Howlett and various appearances in the proceeding in behalf of the relator were made by Glenn Gourts and Howard Lonergan, all deputy district attorneys. The defendant Ray Clark appeared in person and was represented by Charles E. Raymond and Burton J. Fallgren, his attorneys. The ancillary defendant appeared in person and was represented by William J. Crawford, her attorney. A special appearance was made by David Fain, representing himself and Michael Frey, as subpoenaed witnesses. At the special request of the court, Robert Y. Thornton, the Attorney General of the State of Oregon, and some of his deputies, appeared just prior to the conclusion of the hearing, the said Attorney General being present in court at the time of the court's oral rendition of decision from the bench.

Evidence was adduced from the witness stand that indicated to the court that the defendant Ray Clark was in [fol. 26] possession of premises known as 2409 S. E. Main Street, Portland, Multnomah County, Oregon, and that the ancillary defendant Sonny Martin was in possession of premises known as 2411 S. E. Main Street, same city, county and state. Further evidence was offered indicating that the twenty-six slot machines were found in the basement of the premises of Sonny Martin known as 2411 S. E. Main Street and that nothing else was found in said premises. Evidence further indicated that the remainder of the seized property was found in the premises of Ray Clark known as 2409 S. E. Main Street. It was clear that there was no search warrant for the premises of Sonny Martin, 2411 S. E. Main Street. Evidence was also adduced that notwithstanding the affidavit of the relator, District Attorney Langley, that his said affidavit was founded upon information given

to him by Mr. Herder, Chief of Police of St. Helens, Oregon. Chief Herder took the stand and denied the same.

The articles seized under the search warrant, excluding twenty-six cumbersome slot machines, were, pursuant to order of court, brought into open court at a time during the hearing. It was stipulated there was no necessity to bring the slot machines into open court. The court directed the Sheriff to keep the articles in his custody during the night, following 5:45 P.M., Wednesday, May 23, 1956, adjournment, to return them to court at 10:30 A.M. the following day, to wit: Thursday, May 24, 1956. Nonetheless, upon reconvening the court the following day, the absence of many of the articles seized was noted, and their absence was partially explained by a statement that the Grand Jury had required the same for their investigation.

Some evidence was offered on behalf of the named defendants, including some pictures of the premises and the affidavit upon which the search warrant was based. In behalf of the relator, two books of phonograph records were offered into evidence.

A motion was tendered on behalf of the defendants that the court should rule upon the sufficiency of the affidavit [fol. 27] and a motion was also tendered by David Fain calling the attention of the court to an executive order of the Governor of the State of Oregon issued April 26, 1956, to the Attorney General of the State of Oregon directing the Attorney General to take charge of, manage and conduct the investigation and presentation to the Grand Jury of the facts, transactions, circumstances and acts concerned or connected with the violation in Multnomah County of laws relating to certain crimes and other allied vicious or corrupt practice. Argument was received from all attorneys on their various positions. A statement was made by Robert Y. Thornton, the Attorney General of the State of Oregon.

The basic reason for this hearing being the question of the sufficiency of the affidavit for search warrant heretofore tendered to the court by the relator in support of the issuance of such search warrant, the court concluded that the reception of further testimony or evidence from individuals

was not necessary to a proper determination of the issue, and the court now being duly advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the affidavit in support of the search warrant shows upon its face that it was BASED PRIMARILY UPON INFORMATION AND BELIEF ONLY and that the affidavit requested the search warrant for "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to exhibit said photographs"; and that no photographs were among the property seized;

IT IS FURTHER ORDERED AND ADJUDGED that the affidavit was faulty and could not form a basis for a proper search warrant by reason of the above set out facts and other facts adduced at the hearing;

IT IS FURTHER ORDERED AND ADJUDGED said search warrant should be and is held to be in all effects a nullity and any articles seized under the said search warrant were [fol. 28] improperly so seized and should be suppressed as evidence;

IT IS FURTHER ORDERED AND ADJUDGED that the twenty-six slot machines seized by the Sheriff in the execution of the search warrant, being contraband and unlawfully in the possession of any person, be and the same are hereby ordered destroyed;

IT IS FURTHER ORDERED AND ADJUDGED that in view of the executive order from the Governor of the State of Oregon, the remaining property be and the same is hereby ordered impounded in the possession of the Sheriff of Multnomah County, to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard;

IT IS FURTHER ORDERED AND ADJUDGED that any copies of any recordings or transcriptions of the said seized property by whomever made or wheresoever situated be promptly surrendered to the said Sheriff and impounded under the order above set out.

Dated this 29th day of May, 1956,

/s/ John R. Mears
Presiding District Judge

[fol. 28a] [File endorsement omitted]

[fol. 29]

EXHIBIT "F" TO AFFIDAVIT OF WILLIAM J. CRAWFORD

DECISION RE MOTIONS IN THE CASES OF THE STATE OF OREGON VS. JAMES B. ELKINS AND RAYMOND CLARK AND STATE OF OREGON VS. RAYMOND CLARK AND SUNNY MARTIN.

2 pm, Monday, September 17, 1956

[fol. 30] (The following decision was rendered by The Honorable Frank J. Lonergan, Presiding Judge of the Circuit Court of the State of Oregon, County of Multnomah, on Monday, September 17, 1956, at two o'clock p.m.)

The Court: Last week there were several motions directed to the Court here in two cases, State of Oregon vs. Raymond Clark and Sunny Martin, and State of Oregon vs. James B. Elkins and Raymond Clark. The State vs. Clark and Martin is C-34156, and State of Oregon vs. James B. Elkins and Raymond Clark is C-34157.

In the case of State of Oregon vs. Clark and Martin the defendants were indicted on the 22nd of May, 1956, for the alleged crime of possession and operation of slot machines, said to have occurred on the 17th of May, 1956. This indictment was signed by William M. Langley as District Attorney, by Oscar Howlett, his Deputy, and of course was endorsed by the foreman of the Grand Jury, Gladys L. Gray.

Now, to this indictment the defendants protested that the search warrant was invalid and the search and seizure was unlawful, and in that regard I am in accord with that motion. I think the search and seizure was unlawful, and I don't think the search warrant was properly signed or issued, and I am holding that as a matter of law the search warrant was not legal and the search and seizure, therefore, [fol. 31] was not legal either. In that case I am allowing

the motion in that regard, but I am turning over the matters that were found at that time to the Attorney General to be used and disposed of only on order of the Court.

The other indictment was against Elkins and Raymond Clark, dated on the 22nd of May, 1956, alleging that the defendants were guilty of the crime of intercepting and obtaining telecommunications without authority on or about the 23rd of August of 1955. This indictment was also procurred from the Grand Jury, signed by William Langley, by Oscar Howlett, his Deputy, and endorsed by the foreman of the Jury.

This all occurred after the Governor of the State had put the Attorney General in charge of this County, and in my opinion was very, very irregular and very improper. My opinion is and my decision is that the search warrant in this particular instance, being the same as the other under the same circumstances, was illegal; the search and seizure was entirely illegal.

I am not going to suppress the evidence in that case. I am going to turn that over to the Attorney General. In the indictment, C-34157, the alleged crime of intercepting and obtaining telecommunications without authority is based upon Chapter 675 of the Laws of 1955, and the indictment so alleges that being a provision of the law on which the indictment was brought. That law specifically declares [fol. 32] that none of that matter may be released or used, nor any information given about it without an order of the Court.

There's been no order of the Court here or any other place that I know of authorizing the use of any of that so-called telecommunication business. Now, I am not prepared to say, I don't know anything about what the actual recordings are or what they came from, but this indictment, of course, says that it's telecommunications, which is covered by the law as well as radio, and if that is true and there are such tapes of recordings, then they are entirely illegal.

Of course, the use of them so far has been illegal, and if the Grand Jury of this County has turned any of that material or any of those things that were taken by this illegal search warrant over to the Government of the United States, the Grand Jury had no authority whatsoever to do

anything of the kind. No one has any authority to dispose of that or use it in any way without an order of the Court. No order of the Court that I know of has ever been issued to anyone for that purpose.

I am holding in C-34157 the search warranf was illegal and the search and seizure was illegal. I am likewise turning over the things that were gathered in that search and seizure to the Attorney General to be disposed of legally, and particularly if there is any telecommunications, if the law in telecommunications has been violated, he must get an [fol. 33] order of the Court before the Attorney General can use it. That is the order of the Court and that will be the order when it is prepared.

Mr. Dibble, will you prepare the order or have someone prepare it?

Mr. Dibble: I can do so. It would seem more likely that the defense should prepare it. It was their motion.

Mr. Hannon: I can prepare the order, Your Honor.

Mr. Dibble: Submitted to us.

Mr. Hannon: I will take care of that.

The Court: It is the ruling of the Court here.

There's been motions made here and declarations made that the newspapers have copies a lot of this stuff and published it, and I am not holding any brief for newspapers. They are not on trial before this Court. Whatever the newspapers have done, that is their business. If they have violated the law, they can be held for that.

The Law of Oregon, as I read it and under which this indictment was brought, being Chapter 675 of the Laws of 1955, has been violated every step of the road if they are telecommunications. I don't know. No one has brought any evidence to me about it. It may be some other kind of communications which are not covered by that Act. The only thing covered in that Act is telephone and radios and tapping telephone conversations without the consent of one [fol. 34] of the participants; but if the tape recordings are of some other variety or done in some other way, as far as this law of 1955 is concerned, it would not cover it, and the Attorney General in my opinion would have the use of recordings that are legal for the purpose of securing an indictment.

I am asking that all of this be turned over to the Attorney General to be disposed of according to the law and by the order of this Court.

[fol. 35] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 18-321

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, Defendants.

MOTION FOR NEW TRIAL—Filed May 21, 1957

Come now the defendants and each for himself separately, and moving separately in each instance, respectfully moves the Court for an order granting them, and each of them, a new trial for the following reasons:

* * * * * * *

[fol. 37] VII.

The Court erred in ruling on the admissibility of evidence in the following particulars:

(a) In conditionally admitting Government's Exhibits 1 to 5 inclusive (including sub-letter exhibits); and

(b) In admitting Government's Exhibits 1 to 5 generally (including sub-letter exhibits).

VIII.

The Court erred in failing to sustain defendants' objections to the admission of Government's Exhibits 1 to 5, inclusive (including sub-letters thereof) upon the grounds

urged by defendants upon their Motion to Suppress and renewed during the trial, to-wit:

(a) Illegality of State's seizure would make the fruits thereof inadmissible in Federal Court regardless of Federal participation;

(b) There was sufficient evidence of common understanding and general practice of cooperation between State and Federal officers to render them inadmissible in this case;

(c) Evidence adduced at the hearing and in the course of the trial established no bona fide intent or purpose to prosecute other than as a Federal offense;

(d) The Federal search warrant itself was invalid in [fol. 38] that the evidence at the hearing, and at the trial, showed the affidavit for such Federal search warrant to be insufficient as a matter of law;

(e) In holding that this Court had jurisdiction to seize and retain articles which had been introduced in and were exhibits in the State courts of the State of Oregon and were in the actual custody of the Attorney General of the State of Oregon pursuant to the orders of such court and acting as an officer of such courts.

(f) In holding that the validity or invalidity of the Federal search and seizure process was immaterial in view of the finding of the Court that there was no participation by Federal officers in the State search and seizure, all prior to the conclusion of the hearing on the motion to suppress and contrary to the evidence adduced thereat and during the trial of this cause.

IX.

The Court erred in that the action of this Court in compelling the State officers to testify contrary to the provisions of the State Court's temporary restraining order constituted Federal participation in the obtaining of the fruits of an illegal search and seizure and would bar its admission in Federal Court.

[fol. 39] XV.

The Court erred in compelling witnesses George Minielly, Terry Schrunk, William M. Langley, Wayne Gurdane, Claude Cross, Howard Lonergan, and Oscar Howlett to testify in violation of the terms of the temporary restraining order theretofore issued by the Circuit Court of the State of Oregon for the County of Multnomah and contrary to the announced and declared policy of the State of Oregon.

* * * * * * *

[fol. 42] The foregoing motion is based upon Rule 33 of the Federal Rules of Criminal Procedure and upon the record and file herein and is, in our opinion, well founded in law and not interposed for purposes of delay.

Wm. J. Crawford, Burton J. Fallgren, Of Attorneys for Defendant Clark; Walter H. Evans, Jr., Attorney for Defendant Elkins.

Service by copy of the foregoing Motion for New Trial is hereby accepted in Multnomah County, Oregon, this 21st day of May, 1957.

United States Attorney, By James W. Morrell, Asst.

[fol. 43] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

INDICTMENT Seven Counts

No. C-18321 for violation of Title 18, USC, Section 371, and Title 47, USC, Sections 501 and 605

UNITED STATES OF AMERICA,

v.

JAMES BUTLER ELKINS, Defendant.

On this 21st day of May, 1957 came C. E. Luckey, United States Attorney, and James W. Morrell, Assistant United States Attorney for the government and the defendant appeared in person and by Walter H. Evans, Jr., of counsel;

JUDGMENT AND COMMITMENT—May 21, 1957

It Is Adjudged that the defendant has been convicted upon a verdict of guilty of the offenses of unlawfully, wilfully and knowingly conspiring, combining and confederating and agreeing to commit certain offenses against the United States, to-wit: intercepting wire communications and divulging and publishing same without the authority of senders of said communications, as charged in Count I of the indictment herein, and knowingly, wilfully and unlawfully, without authority of senders thereof, intercepting and recording or causing to be intercepted and recorded, wire communications between certain individuals, as charged in Counts II, V, VI, VII, VIII and IX of the indictment herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten Months and do pay a fine of One Thousand Dollars for the offense charged in Count I, and for a period of Ten Months and do pay a fine of One Thousand Dollars for the offense charged in Count II, and for a period of Six Months for the offense charged in each of Counts V, VI, VII, VIII, and IX; that said periods of imprisonment imposed for the offense charged in Counts I and II run consecutively, and that said periods of imprisonment imposed for the offense charged in each of Counts V, VI, VII, VIII, and IX run concurrently and concurrently with the period of imprisonment imposed for the offense charged in Count II; a total period of Twenty Months imprisonment and do pay a fine of Two Thousand Dollars,

It Is Further Adjudged and Ordered that execution of commitment herein be stayed until June 17, 1957, at two o'clock P. M.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William G. East, United States District Judge.

The Court recommends commitment within Multnomah County.

....., Clerk.

[fol. 44] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

vs.

RAYMOND FREDERICK CLARK, Defendant.

INDICTMENT Seven Counts

No. C-18321 for violation of Title 18, USC, Section 371, and Title 47, USC, Sections 501 and 605

On this 21st day of May, 1957 came C. E. Luckey, United States Attorney, and James W. Morrell, Assistant United States Attorney for the government and the defendant appeared in person and by Walter H. Evans, Jr., of counsel;

JUDGMENT AND COMMITMENT—May 21, 1957

It Is Adjudged that the defendant has been convicted upon a verdict of guilty of the offenses of unlawfully, wilfully and knowingly conspiring, combining and confederating and agreeing to commit certain offenses against the United States, to-wit: intercepting wire communications and divulging and publishing same without the authority of senders of said communications, as charged in Count I of the indictment herein, and knowingly, wilfully and unlawfully, without authority of senders thereof, intercepting and recording or causing to be intercepted and recorded, wire communications between certain individuals, as charged in Counts II, V, VI, VII, VIII and IX of the indictment herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four Months and do pay a fine of Two Hundred Fifty Dollars for the offense charged in Count I, and for a period of Sixty Days and do pay a fine of Two Hundred Fifty Dollars, for the offense charged in Count II, and for a period of Sixty Days for the offense charged in each of Counts V, VI, VII, VIII, and IX; that said periods of imprisonment imposed for the offense charged in Counts I and II run consecutively, and that said periods of imprisonment imposed for the offense charged in Counts V, VI, VII, VIII, and IX run concurrently and concurrently with the period of imprisonment imposed for the offense charged in Count II; a total period of Four Months and Sixty Days imprisonment and do pay a fine of Five Hundred Dollars,

It Is Further Adjudged and Ordered that execution of commitment herein be stayed until June 17, 1957, at two o'clock P. M.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William G. East, United States District Judge.

The Court recommends commitment within Multnomah County.

....., Clerk.

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, Defendants.

Name and Address of Appellant:
James Butler Elkins
11834 S. E. Powell Blvd.
Portland, Oregon

Name and Address of Appellant's Attorney:
Walter H. Evans, Jr.
916 Portland Trust Building
Portland 4, Oregon

NOTICE OF APPEAL—Filed May 31, 1957

Offense: Upon Count I violation of Title 18 U.S.C., Section 371 (unlawful conspiracy to commit offense against the United States, to-wit, unlawful interception of wire communications and unlawful divulgence and publishing of the same without authority of the senders); and on Counts II, V, VI, VII, VIII and IX violation of Title 47 U.S.C., Sections 506 and 605 (unlawfully without authority of the senders intercepting and recording or causing to be intercepted and recorded wire communications by certain individuals, "wire tapping", all as charged in the indictment therein, Counts III and IV of the indictment having been dismissed on the trial thereof).

[fol. 46] Concise Statement of Judgment, Date and Sentence: Judgment convicting defendant upon the verdict of guilty of the offenses above enumerated and adjudging him guilty as charged and convicting and commit-

ting him to the custody of the Attorney General for a period of 10 months and to pay a fine of $1,000.00 upon the offense charged in Count I (the conspiracy count) and to be committed for a period of ten months and to pay a fine of $1,000.00 for the offense charged in Count II (wire tapping) and for a period of 6 months for the offenses charged in each of Counts V, VI, VII, VIII and IX with the periods of imprisonment for the offenses charged in Counts I and II to run consecutively and the period of imprisonment for the offenses charged in each of Counts V, VI, VII, VIII and IX to run concurrently and concurrently with the periods of imprisonment for the offenses charged in Count II, making a total period of 20 months imprisonment and a total fine of $2,000.00 and further staying execution of commitment until June 17, 1957, at two o'clock p.m. and ordering that a copy thereof be delivered to the Marshal to serve as commitment. The above judgment and sentence was pronounced in open court on May 21, 1957, and was entered by the clerk on the criminal docket of the District Court of the United States for the District of Oregon on June ....., 1957.

The appellant, James Butler Elkins, is not now confined but is continued on bail.

[fol. 47] James Butler Elkins, the above named appellant, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment, the judgment on each count thereof, and the whole thereof.

This notice of appeal is filed at this time to preserve the defendant's right of appeal in view of the following sequence of events:

May 11, 1957—Verdict of Guilty received

May 15, 1957—Motion for extension of time to May 21 for filing motion for new trial and motion in arrest of Judgment under Rules 33 and 34

May 15, 1957—Order granting motion and extending time for filing motions for new trial and in arrest of judgment to May 21, 1957

May 16, 1957—Motion renewing motion for judgment for acquittal filed

(Oral order fixing time for sentence May 21, 1957 at 9:00 a.m. Not entered in docket)

May 21, 1957—Motion for new trial and motion for arrest of judgment filed

May 21, 1957—Judgment of conviction and sentence made and entered in open court

May 21, 1957—Order staying execution until June 17, 1957

May 21, 1957—Order fixing time for argument on motion for new trial and motion in arrest of judgment and motion for acquittal on June 17, 1957

May 21, 1957—Order continuing defendants on present bond until June 17, 1957

May 21, 1957—Order fixing bond on appeal for defendant at $2,500.00

May 21, 1957—5:20 P.M.—Copy of motion in arrest of judgment and copy of motion for new trial signed as originals, re-filed at request of attorney for defendants.

May 24, 1957—Judgment of sentence and commitment filed. Copies delivered to Marshal, Clerk, attorneys, etc.

[fol. 48] In view of the uncertainties and apparent differences in construction of the time provisions and effect of Rules 33, 34 and 37 (a) (2) and because of the uncertainty existing in the mind of attorney for defendant as to whether or not the motion in arrest of judgment and the motion for a new trial filed as stated above would be "within ten days after entry of the judgment" or "within the ten-day period" and thus toll said period, this notice is now filed so as to preserve defendant's right of appeal but without prejudice to or waiver of rights of appellant in connection with the three motions heretofore referred to and heretofore filed herein and presently set for argument on June 17, 1957.

Walter H. Evans, Jr., Attorney for Appellant James Butler Elkins.

Walter H. Evans, Jr., 916 Portland Trust Building, Portland 4, Oregon, Attorney for Appellant James Butler Elkins.

Service by copy of the foregoing notice of appeal is hereby admitted in the District of Oregon this 31st day of May, 1957.

C. E. Luckey, United States Attorney.

[File endorsement omitted]

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, Defendants.

Name and Address of Appellant:

Raymond Frederick Clark
2409 S. E. Main Street
Portland, Oregon

Name and Address of Appellant's Attorney:

Wm. J. Crawford
Burton J. Fallgren
Corbett Building
Portland 4, Oregon

NOTICE OF APPEAL—Filed May 31, 1957

Offense: Upon Count I violation of Title 18 U.S.C., Section 371 (unlawful conspiracy to commit offense against the United States, to-wit, unlawful interception of wire communications and unlawful divulgence and publishing of the same without authority of the senders); and on Counts II, V, VI, VII, VIII and IX violation

of Title 47 U.S.C., Sections 506 and 605 (unlawfully without authority of the senders intercepting and recording or causing to be intercepted and recorded wire communications by certain individuals, "wire tapping", all as charged in the indictment therein, Counts III and IV of the indictment having been dismissed on the trial thereof).

[fol. 50] Concise Statement of Judgment, Date and Sentence: Judgment convicting defendant upon the verdict of guilty of the offenses above enumerated and adjudging him guilty as charged and convicting and committing him to the custody of the Attorney General for a period of 4 months and to pay a fine of $250.00 upon the offense charged in Count I (the conspiracy count) and to be committed for a period of 4 months and to pay a fine of $250.00 for the offense charged in Count II (wire tapping) and for a period of 60 days for the offenses charged in each of Counts V, VI, VII, VIII and IX with the periods of imprisonment for the offenses charged in Counts I and II to run consecutively and the period of imprisonment for the offenses charged in each of Counts V, VI, VII, VIII and IX to run concurrently and concurrently with the periods of imprisonment for the offenses charged in Count II, making a total period of 6 months imprisonment and a total fine of $500.00 and further staying execution of commitment until June 17, 1957, at two o'clock p.m. and ordering that a copy thereof be delivered to the Marshal and to serve as commitment. The above judgment and sentence was pronounced in open court on May 21, 1957, and was entered as filed by the clerk on the criminal docket of the District Court of the United States for the District of Oregon on May 24, 1957.

The appellant, Raymond Frederick Clark, is not now confined but is continued on bail.

[fol. 51] Raymond Frederick Clark, the above named appellant, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judg-

ment, the judgment on each count thereof, and the whole thereof.

This notice of appeal is filed at this time to preserve the defendant's right of appeal in view of the following sequence of events:

May 11, 1957—Verdict of Guilty received

May 15, 1957—Motion for extension of time to May 21 for filing motion for new trial and motion in arrest of Judgment under Rules 33 and 34

May 15, 1957—Order granting motion and extending time for filing motions for new trial and in arrest of judgment to May 21, 1957

May 16, 1957—Motion renewing motion for judgment for acquittal filed

(Oral order fixing time for sentence May 21, 1957 at 9:00 a.m. Not entered in docket)

May 21, 1957—Motion for new trial and motion for arrest of judgment filed

May 21, 1957—Judgment of conviction and sentence made and entered in open court

May 21, 1957—Order staying execution until June 17, 1957

May 21, 1957—Order fixing time for argument on motion for new trial and motion in arrest of judgment and motion for acquittal on June 17, 1957

May 21, 1957—Order continuing defendants on present bond until June 17, 1957

May 21, 1957—Order fixing bond on appeal for defendant at $1,500.00

May 21, 1957—5:20 P.M.—Copy of motion in arrest of judgment and copy of motion for new trial signed as originals, re-filed at request of attorney for defendants.

May 24, 1957—Judgment of sentence and commitment filed. Copies delivered to Marshal, Clerk, attorneys, etc.

[fol. 52] In view of the uncertainties and apparent differences in construction of the time provisions and effect of Rules 33, 34 and 37 (a) (2) and because of the uncertainty existing in the mind of attorneys for defendant as to whether or not the motion in arrest of judgment and the motion for a new trial filed as stated above would be "within ten days after entry of the judgment" or "within the ten-day period" and thus toll said period, this notice is now filed so as to preserve defendant's right of appeal but without prejudice to or waiver of rights of appellant in connection with the three motions heretofore referred to and heretofore filed herein and presently set for argument on June 17, 1957.

Wm. J. Crawford, Of Attorneys for Appellant Raymond Frederick Clark.

Wm. J. Crawford, Burton J. Fallgren, Attorneys for Appellant, Corbett Building, Portland 4, Oregon.

Service by copy of the foregoing notice of appeal is hereby admitted in the District of Oregon this 31st day of May, 1957.

C. E. Luckey, United States Attorney.

[File endo ement omitted]

[fol. 53] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS, Defendant.

SUPPLEMENTAL JUDGMENT—June 17, 1957

The Court having heard the Plaintiff, represented by C. E. Luckey, United States Attorney for the District of Oregon, and the Defendant, James Butler Elkins, being present in open court with his counsel, Walter B. Evans, Jr., and being advised in the premises,

It Is Hereby Considered, Adjudged and Ordered, that the judgment of the Court heretofore entered herein, on May 21, 1957, be and the same is supplemented by adding thereto, that the Plaintiff is entitled to costs to be taxed herein.

Dated, June 17, 1957.

William G. East, U. S. District Judge.

[fol. 54] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

vs.

RAYMOND FREDERICK CLARK, Defendant.

SUPPLEMENTAL JUDGMENT—June 17, 1957

The Court having heard the Plaintiff, represented by C. E. Luckey, United States Attorney for the District of Oregon, and the Defendant, Raymond Frederick Clark, being present in open court with his counsel William J. Crawford, and being advised in the premises,

It Is Hereby Considered, Adjudged and Ordered, that the judgment of the Court heretofore entered herein, on May 21, 1957, be and the same is supplemented by adding thereto, that the Plaintiff is entitled to costs to be taxed herein.

Dated, June 17, 1957.

William G. East, U. S. District Judge.

[fol. 55]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, Defendants.

Name and Address of Appellant:

James Butler Elkins
11834 S. E. Powell Blvd.
Portland, Oregon

Name and Address of Appellant's Attorney:

Walter H. Evans, Jr.
916 Portland Trust Building
Portland 4, Oregon

SUPPLEMENTARY NOTICE OF APPEAL—Filed July 10, 1957

Offense: Upon Count I violation of Title 18 U.S.C., Section 371 (unlawful conspiracy to commit offense against the United States, to-wit, unlawful interception of wire communications and unlawful divulgence and publishing of the same without authority of the senders); and on Counts II, V, VI, VII, VIII and IX violation of Title 47 U.S.C., Sections 506 and 605 (unlawfully without authority of the senders intercepting and recording or causing to be intercepted and recorded wire communications by certain individuals, "wire tapping", all as charged in the indictment therein, Counts III and IV of the indictment having been dismissed on the trial thereof).

[fol. 56] Concise Statement of Judgment, Date and Sentence: Judgment convicting defendant upon the verdict

of guilty of the offenses above enumerated and adjudging him guilty as charged and convicting and committing him to the custody of the Attorney General for a period of 10 months and to pay a fine of $1,000.00 upon the offense charged in Count I (the conspiracy count) and to be committed for a period of ten months and to pay a fine of $1,000.00 for the offense charged in Count II (wire tapping) and for a period of 6 months for the offenses charged in each of Counts V, VI, VII, VIII and IX with the periods of imprisonment for the offenses charged in Counts I and II to run consecutively and the period of imprisonment for the offenses charged in each of Counts V, VI, VII, VIII and IX to run concurrently and concurrently with the periods of imprisonment for the offenses charged in Count II, making a total period of 20 months imprisonment and a total fine of $2,000.00 and further staying execution of commitment until June 17, 1957, at two o'clock p.m. and ordering that a copy thereof be delivered to the Marshal to serve as commitment. The above judgment and sentence was pronounced in open court on May 21, 1957, and was entered as filed by the clerk on the criminal docket of the District Court of the United States for the District of Oregon on May 24, 1957. On May 21, 1957, motion in arrest of judgment and motion for a new trial were filed and set for argument on June 17, 1957, and on June 17, 1957, said motions and the renewal of the motion for judgment of acquittal were argued and by oral order [fol. 57] of the court were denied on said date. On June 17, 1957, the court made and entered a supplemental judgment which was filed herein on June 18, 1957, wherein and whereby the judgment of May 21, 1957, was supplemented by adding thereto that plaintiff was entitled to costs to be taxed therein. On July 1, 1957, the Court signed a written order denying defendants' renewal of the motion for judgment of acquittal, defendants' motion in arrest of judgment, and defendants' motion for a new trial.

The appellant, James Butler Elkins, is not now confined, but is continued on bail.

James Butler Elkins, the above-named appellant, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment of May 21, 1957, filed May 24, 1957, and from the supplemental judgment of June 17, 1957, filed June 18, 1957, and from the order denying defendant's motion for a new trial and defendant's motion for arrest of judgment and renewal of motion for judgment of acquittal made and entered on June 17, 1957, and from each of said judgments and orders and the whole thereof, and from the written order dated July 1, 1957, denying each and all of said motions.

This defendant has heretofore filed two notices of appeal because of the uncertainties as to the construction of the time provisions of the Rules of Federal Criminal Procedure between the various circuits and because of the coincidence of times herein involved and files this notice supplemental to the previous ones in order to avoid any uncertainty as to whether or not defendant has filed a notice of appeal "within ten days from the entry of the order denying the motion" for a new trial as provided in Rule 37(a)(2) and in view of the date of the written order of July 1, 1957, [fol. 58] denying said motions.

Walter H. Evans, Jr., Attorney for Appellant James Butler Elkins.

The foregoing is a full, true and correct copy of the original Supplementary Notice of Appeal in the within entitled cause.

.....

Attorneys for Appellant James Butler Elkins.

Walter H. Evans, Jr., 916 Portland Trust Bldg., Portland 4, Oregon, Attorney for Appellant James Butler Elkins.

[fol. 59]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, Defendants.

Name and Address of Appellant:

Raymond Frederick Clark,
2609 S. E. Carruthers Street,
Portland, Oregon.

Name and Address of Appellant's Attorney:

Wm. J. Crawford
Burton J. Fallgren
Corbett Building,
Portland, Oregon.

SUPPLEMENTARY NOTICE OF APPEAL—Filed July 11, 1957

Offense: Upon Count I violation of Title 18 U.S.C., Section 371 (unlawful conspiracy to commit offense against the United States, to-wit, unlawful interception of wire communications and unlawful divulgence and publishing of the same without authority of the senders); and on Counts II, V, VI, VII, VIII and IX violation of Title 47 U.S.C., Sections 506 and 605 (unlawfully without authority of the senders intercepting and recording or causing to be intercepted and recorded wire communications by certain individuals, "wire tapping", all as charged in the indictment therein, Counts III and IV of the indictment having been dismissed on the trial thereof).

Concise Statement of Judgment, Date and Sentence: Judgment convicting defendant upon the verdict of guilty of the offenses above enumerated and adjudging him guilty as charged and convicting and committing him to the custody of the Attorney General for a period of 4 months and to pay a fine of $250.00 upon the [fol. 60] offense charged in Count I (the conspiracy count) and to be committed for a period of 2 months and to pay a fine of $250.00 for the offense charged in Count II (wire tapping) and for a period of 60 days for the offenses charged in each of Counts V, VI, VII, VIII and IX with the periods of imprisonment for the offenses charged in Counts I and II to run consecutively and the period of imprisonment for the offenses charged in each of Counts V, VI, VII, VIII and IX to run concurrently and concurrently with the periods of imprisonment for the offenses charged in Count II, making a total period of 6 months' imprisonment and a total fine of $500.00 and further staying execution of commitment until June 17, 1957, at two o'clock p.m. and ordering that a copy thereof be delivered to the Marshal to serve as commitment. The above judgment and sentence was pronounced in open court on May 21, 1957, and was entered as filed by the Clerk on the criminal docket of the District Court of the United States for the District of Oregon on May 24, 1957. On May 21, 1957, motion in arrest of judgment and motion for a new trial were filed and set for argument on June 17, 1957, and on June 17, 1957, said motions and the renewal of the motion for judgment of acquittal were argued and by oral order of the court were denied on said date. On June 17, 1957, the court made and entered a supplemental judgment which was filed herein on June 18, 1957, wherein and whereby the judgment of May 21, 1957, was supplemented by adding thereto that plaintiff was entitled to costs to be taxed therein. On July 1, 1957, the court signed a written order denying defendant's renewal of the motion for judgment of acquittal, defendant's motion in arrest of judgment, and defendant's motion [fol. 61] for a new trial.

The appellant, Raymond Frederick Clark, is not now confined, but is continued on bail.

Raymond Frederick Clark, the above-named appellant, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment of May 21, 1957, filed May 24, 1957, and from the supplemental judgment of June 17, 1957, filed June 18, 1957, and from the order denying defendant's motion for a new trial and defendant's motion for arrest of judgment and renewal of motion for judgment of acquittal made and entered on June 17, 1957, and from each of said judgments and orders and the whole thereof, and from the written order dated July 1, 1957, denying each and all of said motions.

This defendant has heretofore filed two notices of appeal because of the uncertainties as to the construction of the time provisions of the Rules of Federal Criminal Procedure between the various circuits and because of the coincidence of times herein involved and files this notice supplemental to the previous ones in order to avoid any uncertainty as to whether or not defendant has filed a notice of appeal "within ten days from the entry of the order denying the motion" for a new trial as provided in Rule 37(a)(2) and in view of the date of the written order of July 1, 1957, denying said motions.

Wm. J. Crawford, Of Attorneys for Appellant Raymond Frederick Clark.

Wm. J. Crawford, Burton J. Fallgren, Corbett Building, Portland, Oregon, Attorneys for Appellant Raymond Frederick Clark.

The foregoing is a full, true and correct copy of the original Notice of Appeal in the within entitled cause.

Wm. J. Crawford, Of Attorneys for Appellant Raymond Frederick Clark.

[fol. 62] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18-321

UNITED STATES OF AMERICA,

vs.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, Defendants.

STATEMENT OF POINTS TO BE RELIED ON ON APPEAL—
Filed May 7, 1958

Appellants on appeal will contend that the Court erred in the following particulars:

I.

In failing to allow defendants' motion to suppress the evidence.

* * * * * * *

VI.

In failing to allow defendants' motion for a new trial [fol. 63] and defendants' motion in arrest of judgment filed on May 21, 1958.

* * * * * * *

IX.

Errors occurring at the trial duly excepted to as follows:

* * * * * * *

(b) In overruling defendants' objection to the introduction of evidence (oral, Documentary and physical) and specifically, among other rulings, admitting into evidence Government exhibits 1 to 5, inclusive, including lettered exhibits thereunder over defendants' objections.

(c) In ordering witnesses Minielly, Schrunk, Howlett, Cross, Gurdane and William Langley to testify herein notwithstanding the provisions of the restraining order of the Circuit Court of the State of Oregon (Tr. 577, 803, 1093, 1158).

• • • • • • •

[fol. 64] Walter H. Evans, Jr., Burton J. Fallgren, Attorneys for Defendants-Appellants.

Service by copy of the foregoing Statement of Points to be Relied on on Appeal is hereby admitted in Multnomah County, Oregon, this 7th day of May, 1958.

C. E. Luckey, United States Attorney.

[fol. 65]

In United States District Court

Criminal Docket

The United States,

vs.

James Butler Elkins and Raymond Frederick Clark, Defendants.

For U. S.: C. E. Luckey, United States Attorney; James W. Morrell, Assistant United States Attorney.

For Defendant: ~~John~~ P. ~~Hannon, Yoon Building~~; Burton J. Fallgren, Corbett Building; William J. Crawford, Corbett Building.

Apr. 13, 1957, Walter H. Evans, Jr., Sub. as Atty. for deft. Elkins.

Statistical Record:

J.S. 2 mailed 3-4-57

J.S. 3 mailed 6-10-57

Violation Conspiracy by interception of wire communications

Title 18, Sec. 371, USC; Title 47, Secs. 501 and 605 USC

Nine Counts

Bail:

$5,000.00—Elkins

$3,000.00—Clark

Costs	Date 1957	Name or Receipt No.	Rec.	Disb.
Clerk	5/31	54997	5.00	
	"	Treas.		5.00
Marshal	6/18	57541	5.00	
Docket fee	"	Treas.		5.00

DOCKET ENTRIES

• • • • • • •

[fol. 66]

Date 1957	
Mar. 25	Filed defendants' Motion for return of seized property and suppression of evidence.

• • • • • • •

[fol. 67]

Apr. 5	Issued 12 subpoenas duces tecum—to defendants' Atty.
Apr. 5	Issued 6 subpoenas—24 copies—to defendants' Atty.

• • • • • • •

Apr. 9	Filed Subpoena duces tecum on Oscar Howlett—with Marshal's return

• • • • • • •

Apr. 9	Filed Subpoena duces tecum on Geo. Minielly—with Marshal's return

• • • • • • •

[fol. 1]

IN UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Criminal 18321

THE UNITED STATES, Plaintiff,

—vs—

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Defendants.

Transcript of Hearing on Defendants' Motion to Dismiss and Defendants' Motion to Suppress Evidence

Before Honorable William G. East, U. S. District Judge. U. S. Courthouse; Portland, Oregon; April 9, 10, 11, 12, 1957.

APPEARANCES:

Messrs. C. E. Luckey, U. S. District Attorney for the District of Oregon, and James Morrell, Assistant U. S. District Attorney, representing the plaintiffs.

Messrs. William J. Crawford and Burton J. Fallgren, attorneys representing the defendants.

(Whereupon the following proceedings were had:)

* * * * * * * *

[fol. 40] WILLIAM M. LANGLEY, produced as a witness on behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination.

By Mr. Crawford:

Just a minute, please.

Q. State your full name?

A. William M. Langley.

Q. Do you occupy an official office in the government of the State of Oregon?

A. I am District Attorney of Multnomah County, Oregon.

Q. How long have you been District Attorney of Multnomah County, Oregon?

A. Since January 3, 1955.

Q. And, you were, of course, district attorney on March the 16th and 17th of 1956?

A. That's correct.

Q. Pardon me. May instead of March?

A. Yes. That's correct.

Q. Yes. Mr. Langley—Mr. Bailiff, will you have that marked as an exhibit, please?

(A photographic copy of a document entitled Affidavit was thereupon marked for identification as Defendants' Exhibit Number 1 for identification.)

[fol. 41] (Whereupon the Crier presents the document to Mr. Luckey for his examination and thence to the witness:)

By Mr. Crawford:

Q. Will you read that exhibit to yourself, Mr. Langley, and familiarize yourself with it? Have you read it, sir?

A. Yes, sir.

Q. Does your signature appear thereon?

A. Yes, it does.

Q. What is that exhibit?

A. It is an affidavit.

Q. What does it purport to be?

A. It is an affidavit.

Q. Executed by yourself on the date that it bears?

A. It bears the date of May the 17th, 1956.

Q. Did you execute it?

A. Yes, I did.

. . . . . .

[fol. 42] By Mr. Crawford:

Q. Mr. Langley, when were you admitted to practice law in this State?

A. September, 1938.

Q. And have you practiced in this community ever since that time?

A. That's correct.

Q. Have you ever been an assistant U. S. Attorney?

A. Yes, I was.

Q. And did you occupy any other official positions other than attorney at law?

A. What kind of official positions are you talking about?

Q. I am talking about, like, have you ever been an assistant district attorney for—

A. Not in Oregon, no, or anywhere else.

Q. All right. Now, when were you Assistant U. S. Attorney?

A. In 1942, I believe, to 1945.

Q. '42 to '45. And, that was in this district?

A. That's correct.

Q. Who was the U. S. Attorney at that time?

A. Mr. Carl C. Donaugh.

Q. During that period of time did you have occasion to have search warrants to be issued upon affidavit—

[fol. 43] A. I—

Q. —not necessarily your own?

A. —I think so.

Q. On other people's affidavits?

A. (Witness nods head.)

Q. You say "Yes"?

A. Yes.

Q. Many times?

A. Well, I wouldn't be able to say that. I don't know.

Q. I direct your attention to this affidavit and to the language therein: "I, William M. Langley, being first duly sworn, upon oath, depose and say, upon information and belief that there is in the possession of Raymond Clark in a certain building situated on premises occupied by and under the control of the said Raymond Clark at or about 2409 S. E. Main Street, in the City of Portland, County of Multnomah, State of Oregon, . . . " Now, Mr. Langley, at the time you made that affidavit did you make that language which I have just read to you as a positive statement on your knowledge and of your own knowledge?

A. Well, I will answer that question by way of explanation, counsel. Now information has been coming to me in my official capacity that in bootlegging establishments and housing of prostitution controlled by Mr. Elkins and Mr. Clark there were peepholes in which moving-picture cam- [fol. 44] eras were placed and moving pictures of the customers in those places were taken.

Mr. Crawford: Your Honor—

The Witness: Just a minute. I want to make my explanation.

The Court: Yes.

Mr. Crawford: That's not responsive. My question was this: "Did you make it upon your own knowledge?" I didn't ask him what the knowledge was.

The Court: Yes. You can answer that Yes or No, and then give any explanation that you have about it.

The Witness: The answer is no. I will continue with my explanation.

The Court: You may.

Mr. Crawford: I haven't called for an explanation.

The Court: Well, he has the right to explain his answer if he has to.

Mr. Crawford: Very well.

The Witness: The information has been coming to me while I was District Attorney in my official capacity that in the bootlegging establishments and houses of prostitution controlled by Elkins and Clark there were peepholes in which there were placed moving-picture cameras and that these moving-picture cameras were used to take the pictures of the activities of various customers in these places. Some local people were reported to be involved in [fol. 45] these pictures.

The source of my information was confidential and could not proceed in a legal way. When Mr. Brad Williams of the Journal came to me with substantially the same information I asked that he put me in touch with the source of his information which was Mr. Herder, the Chief of Police of St. Helens.

And, Mr. Brad Williams called Mr. Herder on the phone and I listened to Mr. Herder's conversation in which he

said that he knew Raymond Clark; that Raymond Clark was in the business.

The Court: Well, you understand this is all hearsay, Mr. Langley, and the only purpose is that following this conversation you made this affidavit, is that right?

The Witness: That's correct.

The Court: All right.

The Witness: Now, Mr. Herder said that he knew Mr. Clark and that Mr. Clark was in the business of leasing and renting these moving pictures to male stag parties and that these moving pictures were in—were kept in Clark's house.

Now, based upon that information I made this affidavit on information and belief upon my firm conviction, which I still have, that information furnished by a police officer on information—and which, I may—on information and belief establishes probable cause which is the basis [fol. 46] for a legal search warrant.

By Mr. Crawford:

Q. And, you further state in your affidavit that "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to exhibit said photographs" were at that address. Is that true?

A. That's correct.

Q. Now, then, who did you get that from, Mr. Herder?

A. Yes.

Q. He told you that?

A. He told me that Clark was in the business of renting to male—

The Court: You told us that, that he gave you this address.

The Witness: Pardon me. He told me—he understood they were in Clark's house.

The Court: All right.

By Mr. Crawford:

Q. In Clark's house?

A. That's correct.

Q. And that he was in the business of renting these indecent pictures, is that correct?

A. That Clark was. Herder wasn't.

Q. That Clark was. Yes. Now, you're sure that Mr. Herder told you that?

A. Well, I am not repeating anything I am not sure about, counsel.

[fol. 47] Q. Oh. Fine. All right. Now, the next paragraph—view the second paragraph if you will direct your attention to that, Mr. Langley. Now, you will notice that the next paragraph of the affidavit specifically states that that paragraph is on information and belief. Will you please read the second paragraph to yourself?

(Whereupon the witness did as requested.)

By Mr. Crawford:

Q. You have read that?

A. Yes. sir.

Q. Now, did you mean to—at the time that you executed this affidavit that the second paragraph was on information and belief, or was it made of your own knowledge?

A. So far as this affidavit is concerned all the information contained on it was made on information and belief.

Q. And, does that apply to the second paragraph?

A. It applies to the entire affidavit.

Q. Fine. I direct your attention to the third paragraph "I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon." Is that made on information and belief?

A. No, sir; he told me that himself.

Q. He told you that himself, is that correct?

A. That's correct.

Q. Do you know Mr. Herder?

[fol. 48] A. No, I do not.

Q. Have you ever seen him before this date?

A. I wouldn't be able to say about that, counsel.

Q. Do you know that the man you were talking to was Herder?

A. Well, he said so. He is the Chief of Police at St. Helens.

Q. And he told that to you?
A. Well, he said it on the telephone.
Q. Well, did he tell it to you?
A. I heard it.
Q. Well, was Mr. Herder talking to you?
A. I heard it, counsel.
Q. No. Please answer my question.
A. I am giving you the best answer I can.
Q. Was Mr. Herder talking to you?
A. The man who talked to me identified himself as Mr. Herder as being the Chief of Police of St. Helens.
Q. Now, just so there will be no misunderstanding, Mr. Langley, you understand that what is meant by a conversation between two people on a telephone? Do you understand that?
A. I think so.
Q. Now, were you and Mr. Herder talking together on a telephone?
A. Counsel, I have explained that the best I can that Mr. Williams called Mr. Herder on the telephone and I over-[fol. 49] heard the conversation.
Q. How did you overhear it?
A. Well, I was listening on another extension.
Q. You were listening on an extension line?
A. That's correct.
Q. Did Mr. Herder know that you were listening?
A. No. But Mr. Williams did.
Q. Mr. Williams did?
A. Correct.
Q. But, Mr. Herder, when he gave this information that you say he gave, didn't know that you were on the extension?
A. Well, of course, you will have to ask him that. In my opinion, I don't think he knew.
Q. Where did that conversation take place?
A. In my—
Q. Where were you?
A. In my office.
Q. It was in your office. And, what date did that take place?

A. I think on the—it's my best recollection it was on the 17th of May, 1956, probably around 3:00 o'clock, because after that Mr. Lonergan conducted a search for some cases which sustained the position that I took that information furnished to me by a police officer established probable cause, and after we had that authority then we proceeded [fol. 50] to present the matter to Judge Mears.

Q. All right. Now, you say, then, that this conversation to which you have been testifying occurred on May 17, 1956, around 3:00 P.M. and you were in your office in the Multnomah County Courthouse?

A. That's my best recollection.

Q. Well, now, you know if you were there or not, don't you?

A. Well, you have asked several things in one question. I know I was in my office. So far as the date and the time, I am not positive, but that is my best recollection.

Q. But, you know that you were in your office?

A. Positive of that.

Q. You are positive?

A. That's right.

Q. That's on the sixth floor of the Multnomah County Courthouse?

A. Yes; in my private office in the back.

Q. Where was Mr. Williams?

A. He was there.

Q. He was also in your office on the sixth floor of the Multnomah County Courthouse?

A. That's correct.

Q. And, you're positive?

A. Yes, I'm positive. I might clear it up if you are [fol. 51] confused about is by saying that in my private office there is a two-telephone set.

Q. Yes. Were you aware that a motion to dismiss was interposed—a motion to suppress—pardon me—in the District Court for Multnomah County, the State of Oregon, before the Honorable Judge Mears to suppress the evidence that you secured under the search warrant which was the basis of this affidavit? Were you aware of that proceeding?

A. Well, I was aware that—yes, that it was filed, but I don't subscribe to the entire contents of your question.

I didn't seize any evidence. I wasn't—

Q. Well, just a moment. My question is were you aware of that proceeding?

A. Yes.

Q. Did you know that it was going on?

A. Yes. Certainly.

Q. As a matter of fact, you were in the courtroom at one time and spoke to me, didn't you?

A. Well, if I was there I certainly spoke to you.

Q. Well, you were there? Your answer is "Yes", isn't it?

A. Well, I don't know. I can't remember whether I was there or not.

Q. You didn't testify in that proceeding, did you, Mr. Langley?

A. No, I did not.

[fol. 52] Q. Did you ever receive any request or direction from the Court, either one, to appear in that proceeding and testify, in support of your affidavit that you made?

A. Not to my recollection. As I understood the proceeding, Judge Mears didn't permit us to put on our side. He heard your side and made a ruling.

Q. Yes. But, you never testified?

A. That's correct.

Q. On the night of May 17, 1956, were you at or near the residence of Raymond Clark?

A. No.

Q. 2409 Southeast Main Street, Portland, Oregon?

A. No, I was not. The only connection I had with it was to draw the papers, present them to Judge Mears. And I handed the search warrant to Mr. Schrunk and then I went home and I knew nothing about what happened until the next morning.

Q. Until the next morning?

A. That's correct.

Q. What time the next morning?

A. Oh, I don't know. Let's see, 10:00 o'clock, some such time as that, I think.

Q. 10:00 A.M.?

A. I think so. Yes, I think so.

Q. I am going to read you a statement from the official [fol. 53] transcript in the case of State of Oregon, Ex Rel William M. Langley, Plaintiff, vs. Ray Clark and Sonny

Martin, Defendant, and Ancillary Defendant, Number 64256, being the number of the District Court of Multnomah County case. "I have before me the affidavit"—this is Judge Mears speaking—"I have before me the affidavit that was signed by William M. Langley in my presence and sworn to before me by him. For the record let me state that this affidavit and the search warrant were presented to me after two telephone calls about 5:00 o'clock on Thursday evening, the 17th of May. The affidavit and search warrant were presented about 20 minutes of 6:00 by the District Attorney and his chief deputy, Mr. Howard Lonergan. Mr. Lonergan had a volume of the Code under his arm. And I was alone in my chambers. I, of course, recognized the District Attorney and his chief deputy as the principal officers of this County and lawyers of standing in the community.

"I glanced over the affidavit—and I say glanced—I did not study it because I had relied on the integrity and ability of the District Attorney. After it was sworn to I signed the search warrant and the proceedings that happened thereafter have been laid out at length in this court."

Is that substantially the manner in which the search warrant was obtained?

[fol. 54] A. Yes, I think it is correct. It was late because we were busy checking the law as to our position. And I think it was rather late when we went down. And we had asked Judge Mears to hold up his departure in order that he—that these papers might be presented to him.

Q. You say you were checking the law. Did you check the law on the efficacy of a search warrant based upon information and belief?

A. Well, of course, this is not based on information and belief entirely, the source of the information being a police officer, as set forth. That constitutes probable cause which is the basis for the issuance of any warrant.

Q. Well, now, I want to make your position clear. Is this affidavit in this proceeding, Defendant's Exhibit 1, based upon information and belief or is it based upon facts within your own knowledge?

A. No. Counsel, I have stated that clearly. This affidavit is based upon information and belief furnished me by the Chief of Police of St. Helens, who is a police officer.

Q. Well, did you ever advise the Chief of Police, Mr. Herder, that you were listening to his telephone conversation?

A. No, I did not.

Q. You did not?

A. (Witness shakes head.)

Q. You had never seen or heard of Mr. Herder—you [fol. 55] have—you heard of him, of course, hadn't you?

A. That's true.

Q. But, you had never talked with him?

A. Well, I can't say. I might have spoke to him when he was at the Oregon State Penitentiary. I can't remember, I don't think I spoke to him while he was the Chief of Police of St. Helens.

Q. Did you hear Mr. Herder's testimony in the District Court of Multnomah County concerning his acquaintanceship with you?

A. No, I did not.

Q. Did you hear about it?

A. Well, I saw a headline but I didn't read it. I don't recall reading the article.

Q. Did your deputy Howlett tell you what Mr. Herder said?

A. I am hazy about that. I don't—I don't think he did. I can't say for positively.

Q. Never said a word, is that correct, about what Mr. Herder testified to?

A. Well, it wasn't any occasion for us to have any discussion about Mr. Herder at the time, as far as I know.

Q. Can you answer the question?

A. Well, I can answer to the best of my recollection, Howlett—Mr. Howlett and I had no discussion in which Mr. Herder's testimony before Judge Mears was discussed. [fol. 56] Q. Do you recall the date on which that hearing took place?

A. No, I do not.

Q. You do not?

A. No.

Q. Well, let me refresh your memory. May 17, 1956, was on a Thursday. Do you know what occurred on May 18th?

A. You mean what occurred? Well, I was here in the world, I know that.

Q. Was it a judicial day?

A. I don't know.

Q. You don't know?

A. (Witness shakes head.)

Q. Well, may I refresh your memory, Mr. Langley? Wasn't that the primary election?

A. I don't recall.

Q. You don't recall that? May 19th was a Saturday. Was that a judicial day?

A. Well, Saturday generally is not a judicial day, but I don't know in what way you are using the phrase "judicial day."

Q. Did the courts meet on that day?

A. I don't know whether the court was being held on Saturday or not. Some judges do and some judges don't.

Q. And, the following date was Sunday. That would be the 20th, wouldn't it?

[fol. 57] A. I think so.

Q. Is that correct?

A. I think so, yes.

Q. Then, you were served with a motion to suppress this evidence on Monday the 21st, is that correct?

A. I couldn't say about that, counsel.

Q. As a matter of fact, you refused to accept service upon this motion, did you not?

A. I wouldn't think so. The stenographers in my office have instructions to receive the service of all papers.

Q. Is that the reason that you wouldn't let anybody in to serve you?

A. I don't—

Q. Do you blame your stenographer?

A. Pardon me. I didn't hear your question.

Q. Are you blaming your stenographer because you couldn't be served?

A. I am not blaming anybody. In order to expedite the administrative functions of the office I have left instructions with the stenographers to accept the service of papers.

Q. Did you read our motion?

A. I don't think I did.

Q. Did you instruct—

A. I know—

Q. —Mr. Howlett to represent your office?

[fol. 58] A. That's correct.

Q. And, of course, you affirm and ratify all the things that Mr. Howlett did?

A. Well, I have the greatest confidence in Mr. Howlett.

Q. Did you?

A. I might say this: That as I recall Mr. Elkins didn't file any motion to suppress. He didn't have any standing.

Q. I am talking about the case, the title of which I mentioned?

A. What is that?

Q. Which was the case of State of Oregon, ex rel William M. Langley vs. Raymond F. Clark and Sonny Martin.

A. Well, now, what is your question?

Q. Mr. Howlett represented you in that matter?

A. Yes, he did.

Q. He represented your office in an official capacity?

A. That's correct.

Q. All right. At 10:00 o'clock on May 18th you say you first saw this evidence that you seized over there?

A. Pardon me?

Q. On May 18th at 10:00 o'clock, the date following the raid, you first saw the evidence that you seized?

A. I didn't say that, counsel. I said I first heard about the raid the following morning and I estimated it to be about 10:00 o'clock.

[fol. 59] Q. Is that the first time that you knew a raid had been effected upon the Clark residence?

A. Yes; that is correct.

Q. When did you first see any of the articles that were taken on the raid?

A. Well, I can't remember that. It was not for some time. As you refreshed my recollection, there was the primaries and then Saturday and Sunday—it wouldn't be till some time the following week.

Q. When, Monday?

A. I don't think so. I don't think so. I wouldn't be able to say positively. They were not in my custody, as you understand, counsel. I didn't have custody of these articles.

Q. They were what?

A. These articles were not in my custody.

Q. Oh. They weren't? When did they first get into your custody?

A. I didn't have custody of any of this property.

Q. When did you first have physical possession of it?

A. I don't think I ever had physical possession of it.

Q. Now, be careful, Mr. Langley.

A. Well, you just ask your questions, I will answer them.

Q. Did you ever have physical possession—

A. No.

[fol. 60] Q. —of any of the articles that were seized in the raid?

A. No.

Q. Did you ever touch them? I mean, actually, physically touching them?

A. Not that I can recollect.

Q. Were they ever in your private office?

A. Yes, they were.

Q. Did you ever, for instance, play any one of the tapes that were seized in that raid?

A. Well, they were played in my office. I didn't manipulate the machine.

Q. You were present. And, who else was present?

A. I think Mr. Manielly was there representing the Sheriff's office, and I believe Mr.—some of the deputies were in and out of the room while they were being played.

Q. And, where were they played?

A. They were played—this particular playing that I am speaking about was in my private office.

Q. In your private office. On what day did that occur?

A. Well, I think it was, perhaps, the day before this—the case was presented to the Grand Jury in which Mr. Elkins and Mr. Clark were indicted.

Q. When were Mr. Elkins and Mr. Clark indicted?

A. I can't remember that, counsel.

[fol. 61] Q. May I tell you and will you accept the date as May 22, 1956?

A. Well, if you say that is the date I am willing to accept it.

Q. And, you heard these tapes in your private office prior to that time?

A. Certainly. That's correct. One.

Q. The day before?

A. Well, I think so. I can't remember positively whether it was the day before.

Q. Now, did you hear them after the indictment was returned? That would be on the 23rd. Did you hear them on the 23rd?

A. No. I have no recollection of hearing them except the one time.

Q. Let me refresh your recollection. Did anything happen to these tapes while you were playing them?

A. I didn't play them.

Q. Well, you were in the same room, were you not, listening to them?

A. I was in the room while some of them were being played.

Q. Did anything unusual occur?

A. I believe so. I believe one of the tapes came off the reel.

Q. What happened to it?

A. Well, I wasn't there when it happened. I can't answer that.

[fol. 62] Q. You were not there when it happened?

A. Not that I recall.

Q. Who was operating the machine at that time?

A. Well, I can't answer that, counsel. I am not sure.

Q. You don't know?

A. I said I am not sure.

Q. Who was present at the time the machine was being operated?

A. Well, I think Mr. Manielly was there.

Q. Who else?

A. I am not sure.

Q. Your secretary?

A. She perhaps was. I am hazy about that.

Q. And, her name is what?

A. Mrs. Andrews.

Q. Mrs. Anderson. Any other person?

A. Well, I couldn't say one way or the other.

Q. Was Mr. Howlett present?

A. I am not sure. He was present there during some of it, undoubtedly. But, I can't say positively whether he was or wasn't.

Q. Did he ever run in and say "Harry up with those tapes! They want them down in court."?

A. I don't recall that, counsel.

Q. You don't recall that?

[fol. 63] A. No.

Q. But, you are positive about what Mr. Herder said?

A. Well, I am only positive about it because I made a written memorandum of it in the form of an affidavit.

Q. Were you furnished a copy of the order of Judge Mears in the case of State of Oregon Ex Rel William M. Langley, Plaintiff, vs. Ray Clark, Defendant, and Sonny Martin, Ancillary Defendant, Number 64256 in the District Court of the State of Oregon for Multnomah County?

A. I couldn't answer that, counsel.

Q. What do you know about this?

A. Well, I have other things to take care of, you realize, and I delegated that to Mr. Howlett. I think he was helped by Mr. Lonergan and I wasn't concerning myself with it, principally.

I can't remember whether there is in the file the particular paper that you refer to or not.

Q. Do you know the results of that trial?

A. Well—

Q. Of that hearing?

A. I know that—I know that I read in the newspaper that Judge Mears had held that the warrant which he issued was illegal and that he had ordered—instead of ordering it returned to the people from whom it was obtained, which would seem to follow, he ordered it to be held by the Attorney General. I can remember that.

[fol. 64] Q. He suppressed the evidence for use, did he?

A. Well, I don't know what he did. He ordered the Attorney General to take custody of it.

Q. How did you find that out?

A. I think I read it in the newspaper, gossip around the office about how Judge Mears was going to draw appropriate order in view of his ruling.

Q. You didn't inquire from Mr. Howlett the results of the hearing?

A. Oh, I don't know whether I did or not, counsel.

Q. You have what?

A. I can't remember whether I made a special inquiry of him or not.

Q. Do you think, then, the source of the disposition of the case you learned from the newspaper?

A. Well, I think so, as much as anything. Of course—

Q. Did you ever read an order concerning the disposition of that matter?

A. Counsel, we weren't too concerned with it at that time because there was an indictment pending in the Circuit Court and we felt that the determination would be made there.

I do remember this, however, that there was some discussion in our office about applying for a writ of review of Judge Mears' ruling. But, earlier in this proceeding Mr. [fol. 65] Thornton had directed me to proceed and then after we obtained an indictment against Elkins and Clark, Thornton wanted to take the prosecution back. So, under the Governor's directive we gave it back to him. And for that reason we didn't proceed with the legal remedies which we felt that we had in Judge Mears' ruling.

Q. Did you present the matter to the Grand Jury of Multnomah County, Oregon, while this motion for suppression was pending?

A. Well, I can't remember whether—I didn't present it, no.

Q. Did you give directions that it be presented?

A. It was presented but I can't say whether it was presented while this motion was being considered or not. The matter was not presented to the Grand Jury until I had received a letter from Mr. Thornton directing and instructing me to do that. And I thereupon presented it to the Grand Jury. An indictment was returned and then Mr. Thornton decided that he wanted the prosecution which—it was turned over to him.

Q. Did you present the matter or did you direct that the matter be presented to the Grand Jury? Please answer my question.

A. I directed that it be presented upon the authorization of Mr. Thornton.

Q. And that was during this motion to suppress?

[fol. 66] A. I can't recall that, counsel.

Q. As a matter of fact, it was pending and no disposition had been made of the matter, is that correct?

A. I am not—I wouldn't be able to answer that.

Q. Do you know what goes on in your office—or, did you at that time?

A. Oh, I think so.

Q. If the record shows, Mr. Langley, that your deputies, Mr. Lonergan and Mr. Howlett, made certain representations to the Court during this motion to suppress were those representations made in their official capacity as an assistant district attorney?

A. Certainly.

Mr. Crawford: Very well. You may inquire.

Cross examination.

By Mr. Luckey:

Q. Mr. Langley, there are just a few questions that I would like to ask. When this seizure occurred on May 17, 1956, were you acting for or on behalf of any Federal law enforcement agency?

A. No, I was not.

Q. Is there a State statute, State of Oregon, prohibiting wire tapping?

A. Yes, there is.

Q. Was the evidence seized presented to the Multnomah [fol. 67] County Grand Jury?

A. Yes, it was.

Q. For violation of a State offense?

A. That's correct.

Q. Were indictments returned?

A. Yes.

Q. On the basis of this evidence?

A. Yes, sir.

Q. For a violation of the State of Oregon statute?

A. That's correct.

Q. And to your knowledge did the Federal Bureau of Investigation or any other Federal officials ever know that you were going to search Clark's house in advance of the time it was searched?

A. No, they did not.

Q. Was there any cooperation between your office or any Federal agency in connection with this search and seizure?

A. No, there was not.

Mr. Luckey: Thank you.

The Court: Any further questions?

Redirect Examination.

By Mr. Crawford:

Q. About this indictment. Was this indictment—let me ask you this: Certain articles were seized in the raid on the defendant Clark's house. Were some of those articles [fol. 68] or some of the evidence seized as a result of that raid presented to the Multnomah County Grand Jury so that they could consider that evidence in returning their indictment in the wire-tapping case?

A. The answer is yes and this is the explanation: That I contend and still contend that the search was legal. Once a home is entered upon a legal search, evidence of other crimes must be obtained by the officers there. So, the theory upon which we proceeded was that a legal search having been undertaken evidence of other crimes coming to the attention of the officers it was their duty under the law to seize the evidence of other crimes.

Q. That is an abstract principle of law with which I concur, Mr. Langley. But, of necessity I think it has no application in this case nor do I think it is sufficient answer for your explanation of the question put to you. One other question: When you were sworn in and assumed your office as District Attorney for Multnomah County, Oregon, did you take an oath? Did you take an oath?

A. Yes, I did.

Q. And in that oath didn't you swear to uphold the laws of the State of Oregon and of the United States?

A. That's correct and that's what I have done.

* * * * * * *

[fol. 71] ELLSWORTH HERTER, produced as a witness on behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination.

By Mr. Crawford:

Q. What is your full name, sir?

A. Ellsworth Herder.

Q. Do you have a middle initial?

A. Middle initial of L.

Q. Ellsworth L. Now, where do you live, sir?

A. 622 Northeast Ivy Street, Portland.

Q. How long have you lived there?

A. Since November, 1956.

Q. What is your occupation, sir?

A. I am a salesman at Sears and Roebuck.

Q. Is that in Portland, Oregon?

A. Portland, Oregon.

Q. What did you do before that?

A. I was Chief of Police at the City of St. Helens, Oregon.

Q. Was your occupation—how long were you Chief of Police in St. Helens?

A. From July, 1955, to November, 1956.

Q. What was your occupation prior to that time?

A. I was Chief of Police at the City of Rainier, Oregon.

Q. How long were you so employed?

[fol. 72] A. From April, I believe, of 1954, until I went to St. Helens.

Q. Before you were Chief of Police of Rainier, what was your employment?

A. I served as Captain of the guards at the Oregon State Penitentiary.

Q. How long did you so serve?

A. Four and a half years.

Q. And prior to that time what was your occupation?

A. I was a patrolman with the Oregon Department of State Police.

Q. How long were you a patrolman in the Oregon State Police?

A. Seven years.

Q. Seven years. Are you acquainted with William M. Langley, the District Attorney for Multnomah County, Oregon?

A. I do not know Mr. Langley.

Q. Did you, during the month of May, 1956, know Mr. Langley?

A. I did not know Mr. Langley.

Q. Have you at any time and particularly during the month of May, 1956, ever conversed with Mr. Langley?

A. I have never conversed with Mr. Langley.

Q. Were you present in the courtroom this morning during the time that Mr. Langley testified?

A. I was.

Q. Do you know Raymond F. Clark?

[fol. 73] A. I do not know him personally, no.

Q. As of May, 1956, what was your acquaintanceship or knowledge of Mr. Clark?

A. There was no acquaintanceship. The only knowledge I had was the fact that he had, prior to my coming to St. Helens, had been a Chief of Police of St. Helens.

Q. Is that all you knew about him?

A. That is all I knew about him.

Q. Now, did you have a telephone call in May of 1956 from a person who identified himself as Brad Williams?

A. I did.

Q. Now, do you have any way of fixing the date of that telephone call?

A. The only way that I could—

Q. You answer Yes or No and then state what that way is, please.

A. Oh. I believe yes.

Q. All right. Now, how do you fix it?

A. The evening that the call came into the office I was in the office accompanied by two Columbia County deputy sheriffs.

Q. Now, what were their names?

A. John Evans and Spencer Younce.

Q. And, they were, I think you said, deputy sheriffs of Columbia County, Oregon?

[fol. 74] A. Correct.

Q. All right. Now, proceed and tell us what that call was and what it contained?

A. Well, I received this phone call that evening. I was seated behind the desk closest to the telephone. And I answered it and a party identified himself as Brad Williams.

Q. Did he say who he was?

A. He said he was Brad Williams, reporter for the Oregon Journal.

Q. And about what time at night was that?

A. Between the hours of 10:30 or—and 11:30 in the evening.

Q. 11:30 in the evening. All right. Proceed.

A. This call—Mr. Williams had asked me if I could tell him, if I remember it correctly, the words that he used, that he wanted information as to if Mr. Clark had been discharged from his job at St. Helens for stealing gas. I told Mr. Williams that I did not know anything about Mr. Clark because he was—I hadn't been in St. Helens when he was there.

There were several fellows in the office at the time—I am referring to the two deputy sheriffs—who worked under Clark at the time and I told Mr. Williams that it is possible that these fellows might know. So, I asked them if they knew about it and they informed me that that was the truth and I told Mr. Williams.

[fol. 75] Q. Now, which one was that?

A. I believe it was Mr. Evans.

Q. Mr. Evans told you that?

A. And I informed Mr. Williams that this was hearsay only; that I did not know anything about it but the gentleman sitting here told me that that was the truth.

Q. Did you mention Mr. Evans' name?

A. I don't believe I did.

Q. Did you identify him in any manner?

A. Other than he had worked under Mr. Clark.

Q. He had worked under Mr. Clark?

A. Correct.

Q. All right. Did I understand you to say that you then told Mr. Williams that that wasn't your statement of your own knowledge, or words to that effect?

A. That is correct.

Q. Did you make that plain?

A. I made that plain on three different occasions.

Q. During that conversation?

A. During that conversation.

Q. Now, Mr. Herder, do I understand now you're talking on the telephone to this person who is supposedly Brad Williams, is that correct?

A. That's correct.

Q. And, then, Mr. Younce and Mr. Evans are in the same [fol. 76] room with you?

A. Correct.

Q. Now, did you do all the talking over the telephone?

A. I did.

Q. Did Mr. Younce or Mr. Evans talk into this telephone?

A. No.

Q. In other words, is it fair to say that Mr. Williams would ask you—did ask you a question concerning Clark, you then turned to Evans and Younce and asked them, then you relayed the information to Mr. Williams?

A. That is correct.

Q. Now, at that time did you know whether or not Mr. Langley was on the phone?

A. I did not know that Mr.—

Q. Or, on an extension?

A. I did not know that Mr. Langley was on the phone.

Q. Now, you are sure this was in the evening?

A. I am positive it was in the evening.

Q. What makes you sure?

A. I was working on a criminal case and we had just locked the defendant in jail and we were sitting in the office.

Q. Do you recall that—I don't want you to go into the history of the case, or anything like that—but do you recall the criminal and the circumstances and the crime?

A. If I am not mistaken, his name was Keeley. He was a [fol. 77] fugitive from the State of Washington. He was a parole violator.

Q. All right. Now, do you know what date of the month of May, 1956, that was?

A. If my memory serves me correctly, it was on a Friday evening prior to the week of the raid.

Q. A Friday evening prior to the week of the raid. Mr. Herder, I think everyone is in agreement that this raid took place on Thursday night, May the 17th, 1956. And, you say that it was on a Friday night prior to that?

A. To the best of my knowledge. I could be mistaken. However, to the best of my knowledge that is the evening, yes, sir.

Mr. Crawford: Then, by reference to the calendar, may I state for the record, Your Honor, that if that was the date he had in mind, that a reference to the calendar shows it to be the 11th day of May, 1956?

(Discussion between counsel.)

By Mr. Crawford:

Q. Mr. Herder, did you give Mr. Williams, Mr. Clark's address during that conversation?

A. Which address?

Q. The address of Mr. Clark's home?

A. No.

Q. Did you know the address of Mr. Clark?

A. I did not know the address of Mr. Clark.

[fol. 78] Q. Now, Mr. Herder, do you know that the person you talked to on that occasion was Brad Williams from the Journal?

A. The only way that I know positive is that after the conversation had been ended there was further conversation amongst the deputy sheriffs and myself. A point was brought up and I thought it might be of interest to Mr. Williams.

So, within three minutes to five minutes of the time I hung up, the original call, I placed a person-to-person collect to the Oregon Journal Building for Mr. Brad

Williams and he, after the switchboard operator answered, she connected me to him.

Q. Now, from the time that the switchboard operator answered until the time that you were connected to Mr. Brad Williams was there any appreciable length of time?

A. No, sir, there was not.

Q. Was it a fast connection?

A. It was a fast connection.

Q. Well, how was that call placed?

A. I placed it from the St. Helens' Police Department to the—

Q. Well, I mean, did you pay for it or was it placed collect?

A. It was placed collect to the Oregon Journal person-to-person. I placed a person-to-person call to Brad Williams.

Q. Now, the person that you talked to on the second call, [fol. 79] could you recognize that voice?

A. I did recognize it as the same person I had talked to previous.

Q. On the first call?

A. I did.

Q. Now, those two times that you talked to Brad Williams, are those the only two occasions that you did talk to Brad Williams?

A. No. Several days after that Mr. Brad Williams came to my office. He was in there less than 15 minutes. He had asked me for a picture and I had that picture which I had received from the City Recorder of St. Helens and I gave it to Mr. Williams. He thanked me and he left the office.

Q. Is that the extent of your conversation at that time?

A. At that time, yes, sir.

Q. I am speaking about the third time.

A. Yes.

Q. Now, was there any other time that you talked with Mr. Williams?

A. On the next occasion was after the raid. I called Mr. Brad Williams for an explanation as to why my name was used and he informed me that it was the un-cooperation of the Oregonian was the only reason and that he would

look into the matter and he would call me back. And I [fol. 80] have, to this date, not received an explanation of why.

Q. Now, what did you do right after the second call; that is, on the night of which we have identified as May 11, 1956?

A. I went home.

Q. Do you recall testifying in the District Court of this County in the case of State of Oregon, ex rel. William M. Langley, Ray Clark, Defendant, and Sonny Martin, Number 64256?

A. I do.

Q. Did you ever tell William M. Langley that Raymond Clark had in his possession in a building situated on premises occupied by and under the control of the said Raymond Clark at 2409 Southeast Main Street in Portland, Multnomah County, Oregon, certain obscene and indecent photographs with accompanying sound recording? Did you ever tell William Langley that?

A. I never did.

Q. Did you have any personal knowledge that there were such pictures situated at such place in the possession of such a person?

A. I did not.

Mr. Crawford: You may inquire.

Cross examination.

By Mr. Luckey:

Q. Mr. Herder, did you ever have any conversation with [fol. 81] anybody with reference to any properties involving obscene records or pictures, or anything else; in possession of Clark?

A. I didn't quite get that, Mr. Luckey.

Q. Did you ever have any conversation with anybody either telephone or in person as to whether or not Ray Clark had any obscene pictures or records in his possession?

A. That information was passed to Mr. Brad Williams as hearsay.

Q. Oh. You did pass that information as well as the gas information?

A. As hearsay, yes.

Q. I see. And, when did you pass that information to Mr. Williams?

A. The night of the telephone conversation.

Q. And did you pass it to him on any other occasion?

A. No, sir.

Q. Were there any other occasions when you mentioned it when he visited your office or on any other telephone conversations?

A. No, sir.

Q. Did you discuss it with him on only one telephone conversation?

A. On one telephone conversation.

Q. One alone?

A. One alone.

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[fol. 82] Redirect examination.

By Mr. Crawford:

Q. Oh, I am not quite sure—you didn't know Ray Clark at the time Brad Williams called you?

A. I did not know Mr. Clark.

Q. You knew nothing of your own knowledge about Mr. Clark?

A. Nothing.

Q. You are sure that you contacted Mr. Williams at the Journal?

A. I did.

Q. Now, Mr. Langley has testified that he received or listened in on a telephone conversation with you on May 17, 1956, at about 3:30 o'clock in the afternoon. Did you have such a telephone conversation at that time and on that date with Brad Williams?

A. I did not.

Q. Mr. Luckey asked you a question about certain pictures—obscene pictures. Is it my understanding that that was hearsay?

A. That was hearsay.

Q. Did you make that plain to Mr. Williams that it was [fol. 83] hearsay?

A. I definitely did make it plain to Mr. Williams.

Q. Was it on the first or the second call?

A. On the first call.

Q. That is when Mr. Williams called you?

A. That is correct.

Mr. Crawford: All right. That's all.

The Court: Mr. Herder, did you ever have any conversation with any of the personnel of the Federal Bureau of Investigation concerning either Mr. Elkins or Mr. Clark?

The Witness: No, Your Honor.

The Court: Did you ever have, convey any information in any manner to any Federal officer concerning obscene pictures or records?

The Witness: No, Your Honor.

The Court: Or, any articles either in the possession of Clark or Elkins?

The Witness: No, Your Honor.

The Court: Is that all?

Mr. Crawford: Yes.

The Witness: Am I excused for the day?

Mr. Crawford: May this witness be excused?

The Court: You may be excused from your subpoena.

COLLOQUY

The Court: Mr. Luckey, I wonder if you can advise me, does the Government concede that the search and seizure [fol. 84] had by the State officials, the Sheriff of Multnomah County, the original seizure of these articles now sought to be suppressed, whether or not that was an illegal search and seizure? Have you taken any position about it that is binding on this Court?

Mr. Luckey: On that matter, Your Honor, I would suggest that the position of the Government would be that it is immaterial whether or not it was illegal. And, we wouldn't feel that it was incumbent upon us to establish the legality of that search and seizure.

On the other hand, we would not desire to redress the State processes and mark it as illegal in our view. It is a litigious question and one that we do not believe is before the Court except on, possibly, a theory of continued gain through cooperation which we believe the evidence will show is not the case here.

The Court: Well, I was just wondering how far we should go into this matter of the State seizure.

Mr. Luckey: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal.

The Court: Well, then, I suppose I had better let the inquiry as to what part, if any, the Federal officials played in the matter go.

Mr. Crawford: We will try to put it on as briefly [fol. 85] chronologically and as coherently as possible. We don't like to be fenced in because there is a definite pattern to this thing which I believe we can develop.

The Court: All right.

Mr. Crawford: Call Mr. Schrunk.

[fol. 86] TERRY D. SCHRUNK, produced as a witness on behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. Would you state your full name, please?

A. Terry D. Schrunk.

Q. At the present time, what is your occupation?

A. Mayor of the City of Portland.

Q. During the month of May, 1956, and through the balance of '56, were you the Sheriff of Multnomah County, Oregon?

A. I was the duly elected Sheriff of Multnomah County, Oregon.

Q. How long prior to May 17, 1956, had you been Sheriff?

A. Since October 24, 1949.

Q. 1949?

A. I believe it was the 24th or the 25th, the oath of office.

Q. At the present time, are you under indictment in State court?

A. I am.

Q. How many indictments?

A. Two indictments.

Q. In reference to those indictments and other matters which have occurred, particularly, with reference to your [fol. 87] testimony in front of the Senate Select Committee on Improper Activities of Labor and Management, have you made certain utterances in the public press of this community?

A. Yes. I have certainly had part of my say.

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By Mr. Crawford:

Q. Mr. Schrunk, so that you will be familiar with this proceeding, this is a proceeding in the case of United States of America vs. James Butler Elkins and Raymond Frederick Clark, and in this case the two defendants, Mr. Elkins and Mr. Clark, are charged with violation of Section 605 and 501 of the United States Code Annotated which is popularly referred to as the wire-tapping statute. Do you understand the nature of that proceeding?

A. No. I am not an attorney and I am not familiar with—

Q. Well, you understand that this is a criminal proceed- [fol. 88] ing to which Mr. Elkins and Mr. Clark are defendants?

A. I understand—

Q. Yes?

A. —that they are defendants.

Q. Yes. Now, you don't like Mr. Elkins, do you?

A. Well, I don't know what you mean by that. Personally, I am not acquainted with Mr. Elkins.

I have seen him on occasions. Since he is in the courtroom I recognize him now. As an individual I have always been taught to like all people and look for the good in all

people. But, for some of the things he stands for in the community I am opposed to, yes.

Q. You have publicly stated that you are opposed to gambling?

A. To what he stands for in some of his activities. And, I mean to eliminate them out of this community.

• • • • • • •

[fol. 89] Q. Did you participate in the raid upon the residence of Raymond Clark in this City and County on May 17, 1956?

A. Your question is very hard to answer, counsel, I was called to the scene later after the raid had taken place and it was during the final stages of it. I don't know—

Q. You were actually present in Mr. Clark's home, were you not?

A. Yes, I was.

[fol. 90] Q. On that evening?

A. Yes.

Q. On the occasion of the raid?

A. Not at the time of the actual entry or the actual seizure and those things. I was called there by the officer in charge at a later hour because of some difficulties that arose.

Q. Is that the first that you had heard of the raid?

A. No, not—

Q. When was the first time you heard of that raid?

A. It was approximately, I would guess, about 6:00 o'clock, maybe fifteen minutes or a half hour one way or the other, on the evening of May 17, 1956.

Earlier somewheres near 5:00 o'clock at the time my secretary was leaving the office she either left a note or told me there was a call from the district attorney's office that he would like to see me; that he was working on some paper and asked me to wait.

Q. Did you talk with the District Attorney concerning the raid?

A. Yes, sir. The District Attorney came to my office with a search warrant and asked that I have it served.

Q. Did you talk with any other person concerning the service of the search warrant prior to the raid?

A. Well, I talked to the deputy in charge. I am not [fol. 91] sure who all was with Mr. Langley. Whether Mr. Lonergan—whether he was with him or not, I am not positive. It is very possible. I am under the impression that he was. I am not sure.

Q. Was Brad Williams with him?

A. I believe that Mr. Williams was with him at the time. This would be around—somewheres around 6:00 o'clock.

Q. Now, just for the sake of the record, Mr. Schrunk, do you know what Mr. Williams does? Brad Williams, what is his occupation.

A. He is a newspaper reporter with the Oregonian—or, with the Oregon Journal.

Q. That is in Portland, Oregon?

A. In Portland, Oregon.

Q. Was he that day; that is, May 17, 1956?

A. I would assume so, yes.

Q. Now, what time did you arrive at the premises of Mr. Clark?

A. Well, I don't know definitely. Certainly, there is a very long story involved. I would guess it was somewheres around 10:30, maybe 11:00 o'clock.

Q. Have you finished?

A. Yes. I said maybe 10:30, maybe 11:00. I am not sure.

Q. What had you been doing immediately prior to that?

A. Immediately before arriving at the scene?

[fol. 92] Q. Yes, Mr. Schrunk.

A. Well, of course, I drove to the scene in my automobile. I was immediately driving. But, I suppose—during the evening I appeared on a television program that evening at KLOR.

Q. KLOR?

A. Yes. If you will recall that was at the close of the election—primary election campaign.

Q. That was the May primary, was it not?

A. The May primary.

Q. Which voting took place on May 18th immediately the next day?

A. That's correct. I—

Q. Was that a live program that you appeared on that night?

A. It was a live program and I had with me my family —my wife and children.

Q. Do you recall the hours?

A. Of the program?

Q. Yes?

A. I don't, offhand. I would guess it was around 9:00 or 9:30.

Q. Was it a half an hour program—or, was it from 9:30 to 10:00?

A. No. I don't think we could afford that much. I think it was fifteen minutes.

[fol. 93] Q. Well, would that be from a quarter of—

A. The record—

Q. —of 10:00—do you recall it of your own knowledge offhand?

A. No, not exactly. I wouldn't want to say.

Q. But, you do know that you were on a live radio program?

A. Definitely.

Q. Just one moment here, Mr. Schrunk. Where did you receive this call from your officer?

A. I am not positive. The radio log of the Sheriff's office would probably indicate.

Q. No. No. I said, where did you receive the call?

A. Which call, now, are you referring to, Mr. Crawford?

Q. The call from your officer for the scene?

A. To come to the scene of the raid?

Q. Yes. Was it a telephone call or was it some other sort of a call?

A. I am not positive. I am under the impression that we left the radio station and this happened to be it was our wedding anniversary, and we were going home and have dinner together, and that was the end of the campaign. As far as I was concerned that was the end of the evening activity.

But, it seems to me that that—as I was nearing my home I received a radio call; that is, it was either a radio [fol. 94] call or the telephone call at the time I arrived home in which I was either to contact Mr. Minielly or

he called me which I contacted him and talked to him by telephone.

Q. Did you call him at Clark's residence?

A. I am not positive whether I called the number that the dispatcher gave me or whether Mr. Minielly was told where I was and he called me. I wouldn't want to say for sure. I talked to him by telephone.

Q. You talked with him by telephone?

A. Yes.

Q. Is there any doubt in your mind that George Minielly wasn't at Ray Clark's house that evening, 2409 Southeast Main Street—

A. Oh, I saw him.

Q.—at the time he called you?

A. There would be no reason for him to be some place else. He was following his instructions to execute the warrant. I don't know where the telephone call was made from or how it was made.

Q. Who were the deputies on that raid?

A. Well, the officer in charge would have to say that. I am not sure. I believe Sergeant Stackhouse, possibly, was one of them. I am under the impression that Mr. Heem or Officer Heem was one of them.

Q. Who else?

[fol. 95] A. Well, I am not just sure. The officer that organized the raid could testify to that first-hand knowledge.

Q. And, you saw certain officers at the premises, didn't you?

A. That's correct.

Q. Now, when you arrived at the scene of the raid was the raid itself over with?

A. Pretty well, yes. It was over with. They were—as I recall, there was a truck had arrived on the scene. There was some discussion as to how the slot machines were to be taken out of this building, whether they came up through the living-room. I discussed with Mr. Clark and he suggested, "Why don't you take them out to the side, basement?" and showed the people the way. And I said that would be fine as long as we got them loaded in the truck. The officers had gathered a great amount of

material on the dining table, I believe. There were several people around by that time, newspaper reporters and photographers, and people of that nature.

Mr. Crawford: Could I have that marked, please?

(Whereupon the Clerk marked a photostatic copy of a document as Defendants' Exhibit 2 for identification.)

By Mr. Crawford:

Q. Now, Mr. Schrunk, you say there was a great variety of property seized on the raid?

[fol. 96] A. Well, the material—to me it seemed like there was a good deal of material, yes.

* * * * * * *

Q. Mr. Schrunk, when you seize goods on a raid, physical articles, do you give a receipt to the person from whom they are seized?

A. Normal procedure is the officer in charge of the raid issues a receipt to the people concerned.

Q. And that would be issued in your name as Sheriff?

A. Yes, that would be correct.

Q. And if an officer—

A. It would be signed by the individual officer as the deputy.

Q. Yes. That is, it would be Terry Schrunk, Sheriff of Multnomah County by the name of the officer who gave the receipt, is that correct?

A. Well, I don't know if there is any stipulated form for it.

Q. He is acting for you, isn't he?

A. He is acting, yes, as a deputy sheriff.

Q. Now, you know, do you not, that there were certain [fol. 97] tape recordings and wire recordings seized in Mr. Clark's premises on the night of May 17, 1956? You know that, don't you?

A. That's right. Slot machines and a great variety of other material.

Q. Did you ever seize any obscene pictures from the premises of Mr. Clark?

A. No. We seized some obscene records and tape recordings—or, wire recordings, I should say.

Q. You never received any obscene pictures, though?

A. Not that I recall seeing, no.

Q. You know you didn't, don't you?

A. I didn't see any.

Q. Well, did you see everything that was seized?

A. I didn't thoroughly examine it, but I was under the impression there were no pictures.

Q. All right. Now, when did you first see the various items that were seized from the Clark residence?

A. Well, I suppose I saw—the first time was when I—I saw at least part of it on the table. I viewed some of the other items in the basement.

Q. All right. Where did you first see the tape recordings and the wire recordings?

A. Well, I am not positive. I would assume they were probably setting on the table. I recall there were several [fol. 98] spools of wire and I think they were in a sack.

Q. Well, let's narrow this down, Mr. Schrunk. I am talking about tape recordings that carried on them conversations between certain persons. Where did you first see those tape recordings and wire recordings?

A. Well, I am not sure whether I saw those at the scene or whether those were delivered to my office by the officers.

Q. Do you know how they got to your office?

A. They were brought by a deputy sheriff.

Q. Which one?

A. George Minelly was in charge.

Q. When they arrived at your office what was done with them?

A. Well, I am not sure just where—what—I wasn't with the officers.

The next thing that I recall about them was either they were on a hand truck up in the criminal department, eventually they came down, were brought into the inter-office and locked into my safe on the first floor of the County Courthouse.

Q. Now, what time were they locked in your safe? Now, I am speaking about these tape and wire recordings, the subject of this proceeding. When were they locked the first time in your safe, if they were?

A. Well, it would be—oh, I don't know. Possibly an [fol. 99] hour after I left the scene. I am not sure how long of the time.

Q. Did they remain there all night of the 17th and the early morning hours of the 18th—

A. They were—

Q. —in the safe in your office?

A. They were in my office all the time, yes, sir.

Q. Did they remain in your safe?

A. No.

Q. All right. Who was present in your office at the time the tapes were taken there on the night of the 17th and the early morning hours of the 18th?

A. Well, I don't know for sure all the officers that brought these—the material in. There was a lapse of time there; might have been an hour or maybe an hour and a half.

I took my wife home. She had been outside this raid sitting in the car. Took her home, grabbed a sandwich, and then I came back to the courthouse.

Q. All right. Did you go back down to your office?

A. As I—as I recall, I went to my office directly there. I had been there earlier when this material was brought in, checked over.

Q. What time was that when it was first brought in?

A. I wouldn't know what time.

Q. Well, I know you can't recall it to the minute or, [fol. 100] perhaps, not even to the quarter hour, but can you state with reasonable accuracy about what time?

A. It would be speculation.

Q. What is your best estimate?

A. Oh, possibly could have been 1:00 o'clock, 12:30, 1:00 o'clock maybe.

Q. Maybe I can refresh your memory here and help you out. The receipt given to Ray Clark was given to him as appears from the receipt at 11:30 P.M. of May the 17th. Now, does that help you out any?

A. Well, if it was given to him at 11:30 P.M. I suppose the truck—I went to the County garage at East 11th and Belmont to open the storeroom where the 26 or so slot machines, or whatever number of slot machines there were

stored in the basement at the County garage. And then from there I went to the courthouse. Whatever the driving time—I suppose the unloading time over there—I suppose it would be an hour, hour and a quarter, maybe an hour and a half.

Q. Well, then, sometime after 1:00 o'clock A.M. of May 18th, is that pretty close?

A. Somewheres approximately in there. Around, possibly, 1:00.

Q. Give or take a quarter of an hour, half an hour? Now, who was present when you arrived there at your office?

A. Well, I think all of the officers that were on the [fol. 101] raid were there.

Q. Who else was there?

A. I believe that there were some newspaper people there.

Q. Who were they?

A. Well, I am not sure whether they took any pictures down there at that time or not. I don't know if there was a photographer there. I would assume that Mr. Williams was there.

Q. Is that Brad Williams?

A. Yes; Mr. Brad Williams.

Q. Who else?

A. Well, I don't right offhand—don't recollect anyone else.

Q. Was Doug Baker there?

A. I don't recall him being there at that time. I think he dropped by later on, possibly.

Q. About how much later on?

A. Well, I just don't know how much later on.

Q. But, it was on that same morning?

A. It's possible it was.

Q. All right. Now, who else was present at that time?

A. Well, I don't recall anyone else being present.

Q. Do you know a man by the name of Charles Moore?

A. Yes. I know Mr. Moore.

Q. Did you know a man by the name of Richard Novak?

[fol. 102] A. Yes, I do.

Q. Who are they?

A. They are radio technicians, radio people.
Q. Who do they work for?
A. KP—
Q. Or, who did they work for that date?
A. KPOJ, on my understanding.
Q. KPOJ, the Journal?
A. Pardon?
Q. KPOJ, the Journal?
A. I understand the station is associated with the paper.
Q. As a matter of fact, in the early morning hours of May 18, 1956, the tapes were played, were they not?
A. Well, now, you're just getting way off base on your time. You talked about when these things were brought in.
Q. Yes?
A. I told you they were brought in by the deputies, they were put in the safe, they were locked up after they were examined. Later on after—
Q. When?
A. After I took the wife home and then after I came back down and I at that time had requested that somebody that was a technician that knew something about these things—since they seemed to be so awfully important to so many people I was concerned with preserving the [fol. 103] evidence to see that it reached the proper hands.
Q. All right. Now, who was present when the tapes were played in the early morning hours of May the 18th, 1956?
A. Well—

. . . . . .

[fol. 104] Q. Now, tell us who was there?
A. Well, I can tell you that there was no Federal officers present.
Q. Just tell me who was there, Mr. Schrunk. Answer my question.
A. Well, I am not sure for—I believe that Mr. Moore was possibly there, Mr. Novak, Mr. Brad Williams, and myself.
Q. Now, where were they played?
A. In my office.
Q. Is that on the second floor?
A. It's on the first floor.

Q. On the first floor?

A. East side of the building.

Q. On the east side, the 4th Street side of the Multnomah County Courthouse. Now, at that time were any copies made of those tapes?

Mr. Luckey: If the Court please, I suggest that would be irrelevant to this proceeding.

[fol. 105] Mr. Crawford: No, it is not. Your Honor, I simply can't put on this all at once. I must take the time, bit by bit.

The Court: You make the representation that you are endeavoring to connect this up with—

Mr. Crawford: I certainly do. I will show the Court that I have reason to ask these questions.

The Court: Under the representation that you will connect it up under your theory that it will develop a connection with the Federal officials, is that correct?

Mr. Crawford: Yes.

The Court: All right. You may proceed.

Mr. Crawford: And I want the record to show that I have stated to the Court that I believe that I have reasonable grounds for making this statement that I will connect it up.

The Court: Very well.

By Mr. Crawford:

Q. Now, so we have Charles Moore, Dick Novak, and Brad Williams. Who else?

A. I am not sure whether Mr. Doug Baker came in at that time or not.

Q. Was he present at any time during the playing of those tapes?

A. I am under the impression that he was.

Q. Now, was there anybody else?

[fol. 106] A. We are still talking about the morning hours of the 18th?

Q. Yes?

A. Not that I recall.

Q. Were any of your deputies there?

A. No. One of the deputies came in. I called him because I wanted a piece of paper and asked him to bring it back down to me that morning.

Q. Now—

A. I found a piece of paper that had showed up over at the Clark residence which listed all the deputy sheriffs in Multnomah County and where they were working. I was quite perturbed about that.

Q. All right. Now what deputy was that that you called in?

A. That was Mr. Minielly, the officer in charge of the raid.

Q. All right! What hour was that that you called in Mr. Minielly?

A. Well, I wouldn't know on hours. By that time I was getting pretty groggy. I had been through a pretty tough campaign and been spending some long hours.

Q. Was it along about, would you say, after 2:00 o'clock or 3:00 o'clock?

A. It could have very well been.

[fol. 107]. Q. In other words, the phrase we use, "along towards morning"?

A. Well, I just don't—I don't place the time too well. He had gone—gone home after he delivered the material to the office. How much later it was, I wouldn't be prepared to say.

Q. You called him from home?

A. I would guess that I called him from the office.

Q. Did you call him at his home?

A. I am not positive whether he discovered he had it in his pocket or I just wanted to look it over and examine it.

Q. Did he bring it to the office?

A. Pardon?

Q. Did he bring this paper to the office?

A. He brought it to the office, yes.

Q. You don't know what time that was?

A. No. There is no reason for me to check the time. After a man has been on his feet that many hours the time doesn't mean too much.

I am not trying to be evasive with you, Mr. Counsel, I am just trying to be truthful.

Q. When did you first contact the FBI in regard to these tapes that you played?

A. I would assume that it would be on the Monday morning following this raid. I am not positive. It is conceivable [fol. 108] I might have called their office on Saturday following the election, but I would rather guess I called the telephone people, I called Mr. Thornton, I called the Federal Bureau of Investigation. I wanted all agencies that might conceivably be interested in this problem to give me the benefit of their advice.

Q. All right. Now, when is the first time you called the FBI to get their advice?

A. It would be probably on Monday. And their record would probably be the best evidence of that. Possibly it was on the following Monday after the raid which was on a Thursday night. Let's see, Friday was election day—could have been Saturday. But, possibly, Monday.

Q. Monday—

A. You have the—

Q. —the 21st?

A. It could have been.

Q. Now, Thursday, the night of the raid, was the 17th?

A. Right.

Q. The next day, if you will recall, was the election day. Then came Saturday and then Sunday and the first date was the 21st; that is, the first judicial day, that would be Monday. Is that the day you called the FBI?

A. I am not positive whether it was on Saturday or Sunday. I am under the impression it was—or, whether [fol. 109] it was on Saturday or Monday. I am under the impression it was probably the following Monday.

Q. The following Monday?

A. I have no notes or memorandum on it.

Q. May I refresh your memory?

A. Surely.

Q. Do you recall your testimony in front of the Senate Select Committee On Improper Activities In The Labor And Management Field of the United States Senate and, more particularly, on March the 8th, 1957? Do you remember this question being asked you and you making this answer? This question was asked you by Mr. Ken-

nedy, the counsel of the Committee. "Mr. Kennedy: Go ahead. Who else did you play the tapes for?

"Mr. Schrunk: Well, upon seizure I called in the FBI."

Now, when did you call in the FBI?

A. Well, they were not present on the 18th, if that's what you're driving at. They was not present on the 17th. I had not discussed the matter with them before. The earliest possible date that I could have contacted them would have been the 19th. My impression is it was the 21st.

Q. Then, it wasn't "upon seizure" as you said before, is that correct?

A. Well, you're playing with words, Mr. Crawford.

Q. Well, they're your words.

[fol. 110] A. Well, then, you let me play with them and not try to explain what I meant.

Q. But, you did so testify on that occasion?

A. Why, I don't recall. You have the benefit of the transcript.

Q. Would you like to see the transcript?

A. No. If you say that's what the transcript shows I'm perfectly willing to accept your—

Mr. Crawford: Would you hand that to the witness?

(Whereupon the Crier hands a document appearing to be a transcript of the Senate hearing to the witness.)

The Witness: Well, I think your answer is right on down the next question. Mr. Kennedy, of course, kept interrupt-rupting all the time, breaking up every time I tried to say something. I stated in the next one "I called in the telephone company." I called in the telephone company and the FBI at the same time.

By Mr. Crawford:

Q. You remember that?

A. Mr. Thornton was notified at the same time too what—whenever it was. This was all after it transpired. This was not the day of the 17th or 18th.

Q. Well, now, at the time that you called in, let us say, the FBI, were you aware that there was going on in court

a proceeding to suppress this very evidence that we are [fol. 111] discussing here, these tapes?

A. Oh, I knew there was a lot of concern. Tapes had been talked about all over the newspapers and everything else. Specifically—

Q. No. No. Just a minute. Answer my question.

A. Specifically I—

Mr. Crawford: Read the question to him again, Mr. Reporter.

(Whereupon Mr. Crawford's previous question to the witness was read by the Court Reporter.)

* * * * * * *

[fol. 112] The Witness: I don't specifically recall anything about that. It is entirely possible that paper could have been served on my office or on myself to that effect.

By Mr. Crawford:

Q. You were in court, weren't you?

A. I don't recall.

Q. You were in Judge Mears' court on Monday the 21st, weren't you?

A. Whenever the hearing was.

Q. You were under subpoena duces tecum, were you not, and you so appeared?

A. Well, I don't recall the dates. You have the dates there, I don't.

Q. Well, you know that it was on a Monday, don't you, following the raid?

A. No. I don't recall it exactly when it was, Mr. Crawford. I recall being in the court at the hearing.

Q. Were you in Judge Mears' court the day that Mr. [fol. 113] Herder gave his testimony concerning his conversation that he was supposed to have had with Mr. Langley? Do you recall that?

A. No. I don't specifically recall Mr. Herder being on the stand. I might have been out of the courtroom at the time.

Q. But, you were in the courtroom on that same day, were you not?

A. Well, I was in court—in Judge Mears' court when there was the discussion. The calendar date, I am not familiar. And I don't know if you are just trying to tie me up or confuse me on the date. I just don't know for sure what it was. I was there when they held the hearing.

Q. Now, we know that this raid took place on May 17th, don't we?

A. That's right; of 1956.

Q. That was on a Thursday. And Friday was the 18th, Saturday was the 19th, Sunday the 20th, and Monday the 21st. That was the first judicial day after the day of the raid. You know you were in court that day, do you not?

A. If you say, and you have the records to prove it—I am not positive whether I was in court that day all day or part of the day.

Q. I didn't ask you—

A. During the seven years I was Sheriff I was in court many days.

[fol. 114] Q. Were you in Judge Mears' court that day, meaning Monday the 21st?

Mr. Luckey: Counsel has produced a witness here under subpoena. He is his own witness. If he is going to cross-examine in this fashion I think some foundation, Your Honor, should be laid.

The Court: Well, I am content that this witness has advised counsel he does not know what the date was he was in court. He has acknowledged that he was in court in Judge Mears' court on the day that this transaction occurred but he does not recall the date of it. And I accept that as his answer.

Mr. Crawford: Well, I think, my question, Your Honor, was whether he was in court on a Monday immediately following the raid.

The Court: Can you answer that or is that the same question?

The Witness: Your Honor, I don't recall whether it was—

The Court: All right.

The Witness: —it was on a Monday. It could have been a Tuesday or Wednesday, sir.

The Court: All right. You have his answer.
Mr. Crawford: Well—
The Witness: The record will speak on that, I believe.

[fol. 115] By Mr. Crawford:

Q. Now, you were subpoenaed under a duces tecum subpoena to appear in Judge Mears' courtroom on the 22nd day of May which is a Tuesday. Did you appear?

A. Well, I am not familiar with your legal terms about the subpoena, sir. If I was subpoenaed, naturally, I would appear. I don't recall.

You first a while ago you said I was there Monday. If I was told to come back Tuesday I was there.

Q. I asked you if you were there in response to a subpoena duces tecum on Tuesday, being the—

A. I don't know what a duces tecum subpoena is, sir.

Q. Well, now, there, Mr. Schrunk, you were a Sheriff of Multnomah County, Oregon, for a period of seven years—

A. Yes, sir.

Q. —were you not? And in your office who is required to serve all subpoenas duces tecum? What officer of the County?

A. The Sheriff serves subpoenas. In many cases many of them are served by people over 21, as you well know.

Q. Your office, though, when called upon, serves the subpoenas, don't they?

A. Yes, sir. And I have an attorney that is the head of the civil department that takes care of that matter, sir.

Q. You don't know what a subpoena duces tecum is?

[fol. 116] A. I will be glad to have counsel explain it, sir.

Mr. Crawford: Seven years!
The Witness: There was a lot of things I didn't learn in those seven years, sir.

By Mr. Crawford:

Q. Did you ever produce those tapes into court?
A. Yes, sir.
Q. When?
A. Our office produced them in court.

Q. When?

A. I don't know the date. When they were ordered into court.

Q. All right. Let me assure you that the hearing took place on the 21st, the 22nd, and the 23rd of May, being Monday, Tuesday, and Wednesday. Does that—when did you produce the tapes?

A. You have the Court record there, sir. I don't know the date that we produced them. Whenever we were ordered to.

Q. Did you make copies of those tapes?

A. Did I make copies?

Q. Yes?

A. There was copies made, I didn't make them personally. I am not a technician.

Q. Were they made under your direction?

[fol. 117] A. Well, direction? They were made at my request so as to protect the evidence.

Q. What did you do with the tapes, the original tapes?

A. I locked them in the safe until they were, as I recall, subpoenaed for the Grand Jury.

Q. And when were they subpoenaed by the Grand Jury?

A. I don't recall when. Officer Minielly handled that case, provided the material.

Q. Did you appear before the Grand Jury?

A. No, sir; not on that subject.

Q. Were those tapes ordered to be held by you by the Court?

A. Well, Judge Mears' decision was to turn them over to the Oregon State Police.

Q. No. No. Listen to my question.

A. Or, to the Attorney General's office.

* * * * * * *

[fol. 120] Q. I am speaking about the close after the first day of the hearing in Judge Mears' court which I have heretofore identified. I am speaking of Monday—I asked you this question: "Did Judge Mears at that time direct you to hold in your possession the evidence that had been seized in the raid upon Ray Clark's residence?"

[fol. 121] A. I recall no specific instructions from the Court, no.

Q. On the 22nd did the Court so order you?

A. Well, I don't recall when the Court issued its written order. You have the benefit of the transcript. If that's made available I can verify what was said at that time.

Q. I didn't ask you if it was a written order. I asked you if the Court ordered you to hold those as evidence if your possession?

A. I don't recall any such order.

Q. Did you hold the evidence in your possession?

A. It was held. I am not sure when it went to the grand jury.

Q. I am going to show you the transcript, Mr. Schrunk, and ask you to read it to yourself so you will—your memory will be refreshed.

. . . . . .

By Mr. Crawford:

Q. Now, does that refresh your memory, Mr. Schrunk?

A. I am not sure what date this—

Q. Look at the portion immediately following the bracket [fol. 122] on the page and see what the next statement says. There is a date that appears—

(Whereupon the witness reads the document.)

The Witness: I am not sure, Mr. Crawford, whether I was present in the court when this statement was made or not. It's entirely possible it was made to one of my deputies.

Q. Does it say your deputies or does it state the sheriff?

A. No. The—"brought in to the court by the sheriff." Actually, I didn't physically bring the material in.

Q. You were there that day, weren't you?

A. Undoubtedly I was in there part of the time.

Q. Now, it is your recollection, you think, that on May the 21st, 1956, you called in the FBI in this matter?

A. My recollection, the following Monday, which, I believe, would be the 21st.

Q. Now, I don't mean to heckle you, Mr. Schrunk, or anything like that. But, I want again to say, is that your explanation of your statement before the Senate Committee that "upon seizure" you called in the FBI?

A. Yes. My—within as near a time as possible the next business day. And, as you will notice if you go down through that testimony, I also notified the telephone company because it appeared that there were, possibly, some stolen [fol. 123] property involved, other problems; problems of identification. And, I called Mr. Thornton.

Q. Now, why did you call in the FBI?

A. Because I have confidence in their ability as an investigative agency in that it appeared to me that there was a possibility of wire-tap equipment being involved.

Q. Which violated the Federal statute?

A. Could.

Q. Yes. Did you have that in mind when you called them in?

A. I wanted their advice and opinion.

I quite frequently relied on it during the period of time that I was Sheriff.

Q. Well, to that, Mr. Schrunk, you were Sheriff for seven years of Multnomah County?

A. Yes. During that time, unfortunately or fortunately, I never happened to run into a case involving the wire-tap law.

Q. But, was it a common practice and understanding that any time you did find evidence of a Federal crime such as narcotics or violation of the treasury laws such as counterfeiting, or anything like that, you always turned that over to the FBI? I mean, not the FBI, but to the proper governmental agency, didn't you?

A. Well, I have always been a strong believer in cooperation between law-enforcement bodies.

[fol. 124] Q. And, you did so cooperate, didn't you?

A. Working—they have been very kind in providing us instructors in their schools and training programs, things of that nature. So, quite frequently I would ask them for advice or technical help.

Mr. Hoover has advocated that. We, in turn, provide them fingerprints and a lot of other material.

Q. When you find—when they find evidence of a State crime they turn it over to you, is that correct?

A. They pass information along between agencies bulletinized.

Q. That's just common practice, good police work, isn't it?

A. Well, I think cooperation is good police work, yes; teamwork.

Q. Yes. And, that's what occurred during the time—the seven years you were Sheriff?

A. Well, I had fine cooperation from the Bureau.

Q. Did you cooperate with them?

A. I tried to, yes.

Q. Or with any other department like Mr. Kenney here who is a treasury man? If you found any evidence of counterfeiting you would turn it over to Mr. Kenney?

A. Well, quite frequently if it was something—not too many cases—I would certainly ask for his advice.

[fol. 125] Q. If you found evidence of, say, narcotics possession you called in Jack Merrill?

A. We worked with Mr. Merrill, yes. Have I talked to Mr. Merrill, was that your question?

Q. Please listen to my question now. When you found evidence during the time you were Sheriff of a violation of a Federal crime whether it was counterfeiting or narcotics or something which the Federal Bureau of Investigation had cognizance of, you immediately notified the appropriate Federal bureau, did you not, of this evidence?

A. Well, we have narcotics statutes in the State of Oregon. Sometimes they were taken—

Q. Did you, Mr. Schrunk?

A. We frequently sought his advice and consultation.

* * * * * * *

By Mr. Crawford:

Q. My question was when you found this evidence of a violation of a Federal statute did you notify the appropriate Government agency charged with the enforcement?

[fol. 126] A. What violation are you talking about?

Mr. Crawford: Just read the question I asked him the first time.

The Witness: Will counsel restate your question? It's pretty involved.

Mr. Crawford: I am going to have the Reporter read it, Mr. Schrunk.

(Whereupon Mr. Crawford's previous question to the witness in part as follows: "Q. Please listen to my question now. When you found evidence . . . " was read in its entirety by the Court Reporter.)

The Witness: If in our opinion there was a violation of a Federal statute we had knowledge of or information to we would transmit either copies of the report concerned or notify directly the various agencies that might be concerned.

Q. In other words, you made them available to the appropriate Government agency?

A. Yes, sir.

Q. All right. And that was good police work?

A. Very.

Q. I am not trying to get you to say it isn't. Everybody [fol. 127] knows it.

A. The Mann Act, for instance, transportation of stolen cars, interstate things like that we had to rely on Federal authorities.

Q. And you made that evidence available to the appropriate Government agencies, is that correct?

A. The information.

Q. Yes?

A. Yes.

Q. Yes. Now, so, in this case you turned over to the Federal Bureau of Investigation the information of wire tapping, did you not?

A. I called the Bureau and asked them to come over to advise me.

Q. Who came over there, by the way, Mr. Schrunk?

A. Well, I am not just sure. That's been a long time ago.

Q. Well—

A. It might have been—it might have been—

Q. I don't know either. But, let me name off a few names here and see if you recognize them.

A. If you name the right one I might not be able to say. It might have been Mr. Smith and it might have been Mr. Patterson, it might have been Mr. Sherk. I just don't know

for sure who was there. But, they're—they would be able [fol. 128] to tell you.

Q. But, you are sure that—was it Mr. Sherk? Was it Santoiana? Was it Mr. Santoiana?

A. No, I don't believe Mr. Santoiana—although, he has been in my office various times. He is the senior agent in charge.

Q. I have one more name.

A. Might have been Mr. Barton. I am not sure if that's the name you're looking for.

Q. Was it a Mr. Barton?

A. It could have been. I am not positive. They were in and out of our office a great deal, all of those gentlemen.

Q. And you were gracious when the occasion arose?

A. I always try to encourage close working relationships between all bureaus, City, County, State, and National.

Q. Do you know Holger Christoffersen?

A. Yes, I do.

Q. How long has he been a sheriff, do you know of your own knowledge?

A. No. But, a great many years. I would say 40-some years.

Q. And he is retired and he is no longer with the Sheriff's office? That is, retired on age?

A. Yes, sir.

[fol. 129] Mr. Crawford: I have no further questions.

Cross examination.

By Mr. Luckey:

Q. Mr. Schrunk, did you at any time prior to this raid contact any Federal officer or talk with any Federal officer about the search warrant?

A. No, sir. I didn't know about the raid until late in the evening myself and it was executed from then on.

Q. And, before at any time during the progress of the raid did you confer or talk with any Federal officer concerning the raid?

A. No, sir.
Q. Or, the search warrant?
A. No, sir.
Q. Or, what was to be seized?
A. No, sir.
Q. Or, what was seized?
A. No, sir.

Q. Have you ever had any other occasion when you had wire-tap evidence or evidence of a Federal violation that in your judgment involved wire tapping which you reported to the FBI or obtained—sought the cooperation of the FBI?

A. Not to my recollection, sir. We have had cases reported to the telephone company but not to my recollec-
[fol. 130] tion on this.

* * * * * * *

By Mr. Luckey:

Q. Did you observe any Federal officer present at the home of Ray Clark at the time the raid was in progress?
A. No, sir.

* * * * * * *

By Mr. Luckey:

Q. Did anyone under your direction or did you contact any member of any Government agency concerning the articles seized in this raid or to be seized in the raid
[fol. 131] prior to its entire consummation?
A. No, sir.

* * * * * * *

[fol. 132] Holger Christoffersen, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name.
A. Holger Christoffersen.

Q. How old are you, Mr. Christoffersen?
A. Seventy.
Q. What is your occupation?
A. I am retired.
Q. Before you retired what was your occupation?
A. I was Chief of the Criminal Department, Multnomah County Sheriff's Office.
Q. How long were you chief?
A. Forty years.
Q. How long?
A. Forty.
Q. Forty years?
A. Well, chief—I was a deputy, I guess, about two years and then I was made chief. It would be about thirty-eight years as chief.
Q. Thirty-eight years Chief of the Multnomah County [fol. 133] Deputy Sheriff's Department?
A. That's right. Yes.
Q. When did you retire, Mr. Christoffersen?
A. On August the 1st, 1956.
Q. Then, you were chief of the criminal department during the months of May, July, and—what date in August?
A. August 1st.
Q. August 1st of 1956?
A. Yes.
Q. Mr. Christoffersen, during the time—
A. May I clear you up on that subject? I was chief but I was ill from February—I never went back to the office after February.
Q. Never went back to the office after February?
A. After February 17th. I was injured and was laid off—laid up.
Q. Now, during the time that you were chief, was there a common practice and understanding between you and law enforcement officials—or, let me put it this way: was there a common understanding and practice between the officials of your department; that is, your department, let's put it that way, and the various law enforcement agencies of the Federal Government to the effect that if in your investigations of State crimes you also uncovered evidence of viola-

tion of Federal crimes, that you would turn that evidence [fol. 134] over to the appropriate Federal authority?

A. Well, we would always call them in when we found out anything that might be relative or violation of Federal law.

Q. And—

A. And we would always notify them and have them come over. Sometimes they would take the case, sometimes it wasn't a case.

Q. But, any time you found evidence of what you thought was a violation of a Federal law you turned it over to the appropriate Government agency, is that correct?

A. Well, yes. We always consulted with them on it. If they took the case it was all right with us and if they didn't we got along the best we could with our case.

Q. Now, conversely, did you, in your cooperation between the various law enforcement officers of the Federal Government—every time they found evidence of a State crime did they notify you?

A. Well, they were very cooperative with us. If they knew of anything—like, criminals might come in here and might be located around here pulling jobs in the City or County, why, they kept us advised. They did.

Q. Was there good cooperation between your office and the various law enforcement agencies of the Federal Government?

A. Yes; very good cooperation. Excellent.

Q. That included the Federal Bureau of Investigation?

[fol. 135] A. It did.

Q. The Treasury Department?

A. Yes, sir. Postal and Narcotics.

Q. Whatever department had charge of narcotics?

A. Yes.

Q. I see. Who is chief in charge over there now, Mr. Christoffersen?

A. I think Stanley McDonald, I heard.

Q. When did he take over?

Q. I don't know, sir. Sometime last summer or right after last fall, I believe it was. After I resigned or before—

Q. Who was immediately under you?
A. Captain Howard Kelley.

Mr. Crawford: You may inquire.

Cross examination.

By Mr. Luckey:

Q. You had no personal knowledge concerning the raid that we are concerned with here, did you?
A. No; none whatever.

* * * * * * *

[fol. 137] Robert W. Franz, produced as a witness in behalf of defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name.
A. Robert W. Franz.
Q. Where do you live?
A. 4404 Southeast View Acres Road, Milwaukie.
Q. That's Oregon?
A. Yes.
Q. What is your occupation, sir?
A. Vice-president, First State Bank of Milwaukie.
Q. Vice-president?
A. (Witness nods head.)
Q. Do you hold any other position in the bank?
A. Director, cashier.
Q. Were you served with a subpoena here—
A. Yes, I was.
Q. —in this case? Were you directed to bring with you certain documents?
A. I was.
Q. Do you have those with you?
A. Yes, I do.
Q. Would you hand them to the Bailiff, please?

[fol. 138] (Whereupon the witness does as requested.)

Mr. Crawford: Mr. Bailiff, if you please, would you hand this paper to the witness?

(Whereupon the Crier does as requested.)

• • • • • • •

(Whereupon the Crier hands the document to Mr. Luckey.)

The Court: It will be received.

[fol. 139] By Mr. Crawford:

Q. What do you call the record that you are holding in your hand, Mr. Franz?

A. This is a record of entry.

Q. That's a record of entry, you say? Is that a record of entry to a safety deposit vault located in the First State Bank at Milwaukie, Oregon?

A. Yes, sir. The box number is on the upper right-hand corner.

Q. What is that number?

A. That—you're speaking of now—

Q. As of the time that the box was rented as appears from that card?

A. The box number was 912.

Q. 912?

A. Yes.

Q. All right. On what date was the box rented?

A. June 4, 1956.

Q. Who was the box rented to?

A. Oregon State Police.

Q. By that do you mean the State of Oregon?

Mr. Luckey: It speaks for itself, Your Honor.

The Court: He said Oregon State Police.

By Mr. Crawford:

Q. Who paid for the box?

A. No one. That was—

Q. Well, that's the State of Oregon, then?

A. It might be termed public service.

[fol. 140] Mr. Crawford: That figures.

Q. Did you bring all the records in connection with the rental of that box?

A. Yes, sir.

Q. Do you have an application there?

A. No.

Q. What other records do you have?

A. Here before me?

Q. Yes?

A. I have the subpoena which was issued in connection—and this is the search warrant which I received in connection with this box.

Q. Do you have any other records of any kind?

A. I have no other records in connection with this box either with me or at the bank. This was the only record which we took. There is normally—

Q. Go ahead.

A. Do you want me to go on?

Q. Yes?

A. There is normally a contract signed at the time one rents a box; however, that's with the understanding that it's for normal purposes, for the keeping of valuables for an indefinite period of time. You know what I mean. And, there is charges in connection therewith and thereupon to be paid at that time, and so on. And, they lease it, actually, [fol. 141] I believe, legally for a period of one year or more, and so on.

However, this is, as I understood it at the time—was a very temporary maneuver and, therefore, it was a question of safe keeping, and what. And this was a better method than safe keeping, because safe keeping in a bank is quite a mess.

Q. Well, we won't go into safe keeping, then. Now, this box, then, was rented to the Oregon State Police, is that correct?

A. Yes.

Q. Who were the signatories on the box?

A. Claude Cross and Vayne M. Gurdane.

Q. Do you know who they are?

A. I do.

Q. Who are they?

A. Well, they are State Police officers.

Q. All right. Now, this bank of yours—are you a member of the Federal Reserve System?

A. No.

Q. Are your funds on deposit insured by the Federal Deposit Insurance—whatever that department is?

A. Yes.

Q. You know the department I am speaking of?

A. Yes. Federal Deposit Insurance Corporation.

Q. Yes. What is the date of the first entry into the box?

A. June 4, 1956.

[fol. 142] Q. Who made that entry, according to your record?

A. Claude Cross.

Q. Now, in order to save time, Mr. Franz, read each succeeding entry, the time of day the entry was made and by whom it was made up until the entry of August 1, 1956. Will you do that, please?

A. Yes. June 4, 1956, 10:05 A. M., Claude Cross. June 4, 1956, again. 4:15 P. M. Claude Cross. And, June—it's a little hard to decipher ball point pen. I think it's June the 5th, 1956, 11:45 A. M., Claude Cross. And, June 5th, again, 1956, 4:30 P. M., Claude Cross. June the 6th, 1956, 10:10 A. M., Claude Cross. June 6th, 1956, 4:25 P.M., Claude Cross. June 7, 1956, 10:00 A. M., Claude Cross. And, June 7, 1956, 2:40 P. M., Claude Cross. June 8, 1956, 3:25 P. M., Claude Cross. June 11, 1956, 2:45 P. M., Claude Cross. June 12, 1956, 10:07 A. M., Claude Cross. June 12, 1956, 4:00 P. M., Claude Cross. June 14, 1956, 10:10 A. M., Claude Cross. June 22, 1956, 12:05 P. M., Claude Cross. June 22, 1956, 4:45 P. M., Claude Cross. June 26, 1956, 11:15 A. M., Claude Cross. June 28, 1956, 2:45 P. M., Claude Cross. June—or, rather, July. July 2, 1956, 2:05 P. M., Claude Cross. Did you say stop at August 1st?

Q. August 1st.

A. Do you want me to read August 1?

Q. 1956? Yes. Read that.

[fol. 143] A. August 1, 1956, 10:05 A. M., Claude Cross. And, August 1, 1956, 2:55 P. M., Claude Cross.

Q. What were the times of day on August 1st, '56?

A. 10:05 and 2:55.

Q. That would be 10:05 A. M. and 2:55 P. M.?

A. P.M. Uh-huh.

Q. What are your banking hours?

A. At the present time, or then?

Q. Then?

A. Then?

Q. Yes?

A. 10:00 to 3:00 were our normal opening hours.

Q. Just one moment, please. By reference to a calendar for the year 1956, August 1st came on a Wednesday.

A. (Witness nods head.)

Q. Would your answer be the same now as to the banking hours?

A. Yes. 10:00 to 3:00. How—however, I might add that if someone wanted to get—you see, at the same time we were operating that with the banking doors opened from 10:00 in the morning till 3:00 in the afternoon. Then we were operating these walk-up teller windows on the side of the building which you could walk to from the sidewalk which were open until 5:00 in the afternoon.

Now, if a person should happen to come to that sidewalk [fol. 144] teller window at 4:00 o'clock or five minutes of 5:00 and want to get into a safety deposit box we would tell him to go around to the back door and we would open it up and let him come into his box.

Q. How long, though—you said that could be up until 5:00?

A. That's right.

Q. And, after 5:00 o'clock could they get in?

A. Very, very doubtful.

Q. Well—

A. Unless they happened to have a particular friend and they could catch him at a window, or something like that—you know what I mean. But, it was very, very unusual something like that would happen.

Q. Tell me something about these safety deposit boxes or vaults. Now, in the first place, how many keys were there to this particular box 912?

A. I believe there were two keys.

Q. Who had those keys?

A. I am not sure who had them. I know that Claude Cross had one.

Q. Who else had one?

A. Well, I would presume—I am presuming only from the signature that Vayne Gurdane had one.

Q. Haven't you any way of telling from your bank records who had—

[fol. 145] A. Who the keys were issued to?

Q. Yes?

A. The keys were issued to Claude Cross.

Q. Two?

A. I don't know. There are two keys to every box. Under normal conditions he would be given two keys.

Q. Do you have any reason to believe that your banking practice was not followed in this case?

A. No, I have no reason to believe. Under normal conditions it would be two keys. And, I would assume that there were two keys given in this instance, also.

Q. Well, now, you noticed that there are two signatures on that card, one of Vayne Gurdane and one for Claude Cross?

A. Claude Cross.

Q. Claude Cross?

A. Yes.

Q. Now, what makes you believe that both keys were issued to Claude Cross?

A. Well, there would be a call for it with two signatures, two entry slips—two entry signatures authorized on the box, they would be entitled to one key each.

Q. Well, I guess maybe I didn't understand you. I thought you said that there were two keys, all right, for that box—

A. Yes.

Q. —but both of them were issued to Claude Cross. Is [fol. 146] that what you meant to say?

A. Yes. That's what I meant.

Q. Well, Mr. Gurdane—didn't he have a key?

A. Well, I am assuming that Claude Cross originated the box. In other words, he came in and opened up the transaction to start with. And, with the two signatures on that, the understanding there were going to be two signatures, we might possibly have given the two keys to Claude Cross with the idea he would give the other key to Vayne Gurdane.

Q. But, Vayne Gurdane, of course, had a right to go in the box under that card?

A. Absolutely.

Q. There is no question about that?

A. No question about it.

Q. All right. Now, tell the Court what the outside of these boxes looks like?

A. Well, it's a series of small steel doors approximately three-quarters of an inch thick, highly polished steel.

Q. At that point, do you know how big this particular box 912 is?

A. That was a large box. That was the largest, I believe—

Q. What are the dimensions?

A. Two feet deep.

Q. Two feet deep?

A. Yes; inside. And, nine by twelve on the face.

[fol. 147] Q. Twelve inches wide and nine inches high?

A. Right.

Q. Nine inches high?

A. It might vary a fraction from that. But, in order to get it into even figures they classify it as of that size.

Q. Now, that is the face of the—

A. Of the steel door.

Q. —of the steel door which is, in fact, a little steel safe, isn't it?

A. That's right.

Q. Yes. Is this correct: the box sits—that is, the box which is extracted from the recess fits inside of that space?

A. That's right.

Q. So, it would be slightly smaller than the dimensions you have given?

A. A fraction.

Q. Now, there is yet another key required to open the box, is there not?

A. That's right.

Q. What is that called, Mr. Franz?

A. It's called the guard key. It won't open the box by itself any more than the customer's key will open the box by itself. The two have to be used in conjunction.

Q. In other words, there are two separate locks?

[fol. 148] A. That's correct.

Q. The key that the bank has, however, when used in conjunction with another customer's key will open any box in the bank?

A. That's right.

Q. Now, these various boxes are one on top of the other flush with the wall, are they not?

A. Right.

Q. And, if a box was in its recessed vault and the door is closed and locked is there any way in the world that a person on the outside looking at that box—is there any way that a person could tell what was inside that box?

A. None.

Q. Is it a fair statement to say that the two locks would have to be turned, the door opened, and then the box removed and then the box itself opened—oh, by the way, let's describe that box. Does that have a cover on it?

A. Yes.

Q. Does that fit tightly when—

A. Yes.

Q. —it is in the box?

A. Yes.

Q. When you open the door of the safety deposit vault and look into the recess you still cannot see what is in the box, can you?

[fol. 149] A. No.

Q. In other words, you would have to remove the box from the recessed vault and then open up the lid to determine what is inside the safety deposit box, is that correct?

A. That's correct.

Q. Now, let's go to September 5, 1956, on your record. Please read the notations for September 5, 1956.

A. September 5, '56, 3:10 P. M., Vayne Gurdane—Vayne M. Gurdane. And, that was the date of the search warrant.

Q. And is that the only time that Mr. Gurdane opened that particular box? Would you consult—that is, as appears from the card—with the car up to that time?

A. As it appears from the card.

Q. That is from the date of the hiring of the box until September 5th, the day of the search warrant, is that the

only time that Vayne Gurdane signed in to open the box?

A. That's the only time that he signed, yes.

Q. What was the date again?

A. September 5, 1956.

Q. At what hour of the day?

A. 3:10 P. M.

Q. There is no chance of that being A. M., is there?

A. No. No.

. . . . . .

[fol. 150] Q. Is there not any chance of that being A. M.?

A. Because the bank was closed, I am sure of that, at 3:10 in the morning and there wouldn't be anybody there to open the vault. There is a time lock on the vault and it couldn't be opened. Even if somebody were there it would be absolutely impossible.

Q. A time lock on the vault that encloses the space in which the safety deposit boxes are?

A. That's right. All right. I don't know if I asked you this, Mr. Franz, but have you brought with you, now, all of the records of the bank relating to the renting of this box and the people who went into it and the people who came out of it?

A. Yes; everything we have.

Q. Now, were you present on September 5, 1956, the day of the search warrant, when that box was opened at 3:10 P. M. in the afternoon of that day?

A. Yes, I was.

Q. Who else was present?

A. Vayne M. Gurdane, Ronald E. Sherk, and I don't recall if there was anyone else there or not in the way of —other than bank personnel, I am speaking about.

Q. Now, did you see what was taken out of that box?

A. I have a receipt for it.

Q. Would you hand that to the Bailiff, please?

[fol. 151] (Whereupon the witness does as requested.)

Mr. Crawford: Hand that to the witness, please.

(Whereupon the Crier does as requested.)

By Mr. Crawford:

Q. Directing your attention to this receipt, where was the typing done of that receipt, if you know?

A. It was done at the bank.

Q. It was done at the bank?

A. Yes. The reason that is there is because I read the search warrant and on the front it says you're supposed to get a receipt, so it seemed like a handy place to put it. I had them type it on the back.

Q. All right. Who typed it?

A. I don't know. Don't remember.

Q. Did Mr. Sherk type it?

A. I don't know whether he did or not. Pretty good typing.

• • • • • • •

[fol. 152] The Court: May I interrupt, please, Mr. Crawford? That is Exhibit G-2.

Mr. Crawford: G-2.

Q. Could you, Mr. Franz, just read that?

A. Do you want me to read the old receipt here? He has got some files here on the top—or just the items?

Q. Where it starts out "I have received the attaches search warrant . . ."

A. That's the whole thing.

"I have received the attached search warrant September 5, 1956, and have executed it as follows:

"On September 5, 1956, at 3:15 P. M. o'clock, I searched the premises described in the warrant and I left a copy of the warrant with Robert Franz, Manager, First State Bank of Milwaukie, at the place of search, together with a receipt for the items *seized*.

[fol. 153] "The following is an inventory of the property taken pursuant to the warrant:

"5 electronic tape recordings.

"1 Minifon recording machine.

"3 spools of Minifon recording machine wire.

"This inventory was made in the presence of J. Eldon Dunn, Special Agent, FBI, Portland, Oregon"—

evidently he was there too—

"and Capt. Vayne M. Gurdane, Oregon State Police, Milwaukie, Oregon.

"I swear that this inventory is a true and detailed account of all the property taken by me on the warrant."

And it is signed Ronald E. Sherk.

. . . . . .

[fol. 164] FRANK J. KENNEY, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name for the record?
A. Frank J. Kenney.
Q. K-i—
A. K-e-n-n-e-y (spelling).
Q. K-e-n-n-e-y (spelling)?
A. (Witness nods head.)
Q. What is your occupation, Mr. Kenney?
A. I am a special agent in charge, United States Secret Service, District of Oregon.
Q. What Federal violations are under your jurisdiction?
A. We have numerous violations under our jurisdiction: counterfeiting, forgery of Government obligations—
Q. Government checks?
A. Government checks.
Q. Forged endorsements?
A. Yes, sir.
Q. Mr. Kenney, how long have you been so employed?
A. Since June of 1941.

Q. Where have you been employed?

A. Washington, D. C., Chicago, and Portland.

[fol. 165] Q. How long have you been in Portland?

A. 1947.

Q. That is approximately ten years?

A. Yes, sir.

Q. Mr. Kenney, have you had occasion to work with and cooperate with the State authorities of the State of Oregon in the performance of your duties?

A. I have.

Q. Mr. Kenney, is there a common practice and understanding between your department in this locality and the State and county officials of the State of Oregon that if the State of Oregon or the county officials or city officials should, in their investigation, discover evidence of Federal crimes relating to your jurisdiction—do they turn the evidence of that crime over to you and make them available to you?

A. In most instances, yes.

Q. Has that happened many times?

A. In the majority of the cases, yes, that we have jurisdiction in.

Q. Now, in the course of your investigation conducted by yourself of those offenses of which your organization has jurisdiction and are charged with investigating, in your official capacity if you discover evidence of violations of State crimes do you likewise make that evidence and information available to the appropriate State, county, or city, officers and enforcement officials?

[fol. 166] A. Yes. We cooperate in all matters of mutual interest.

Q. Then, this matter is a matter of police accommodation—that is, cooperation?

A. Police cooperation, yes, sir.

Q. Is that a general practice, generally?

A. It's good police practice, yes.

Q. I mean, is it, Mr. Kenney—

A. What?

Q. —is it a general practice?

A. Yes.

Q. That you engage—

A. Yes, sir.

Q. Now, during 1956, of course, that practice was engaged in.

A. Yes, sir.

Q. Now, in my question I used the word "understanding." You understand, of course, that I am not relating to any written understanding but a tacit oral, taken-for-granted understanding? You understood I used the word "understanding" in that sense?

A. Yes, counsel.

Mr. Crawford: You may inquire.

Cross examination.

By Mr. Luckey:

Q. Mr. Kenney, you operate independently in your re- [fol. 167] spective spheres, do you not, however?

A. Yes. We have our own jurisdiction set by statutory law.

Q. You don't know anything about the situation that is before this Court in this case, do you?

A. I do not.

Q. Now, the word "turning" over evidence was used in this matter. I mean, counsel's remark to you contained that word. What ordinarily is your practice with reference—is it exchange of information?

A. It involves both the exchange of information and evidence if the case is being prosecuted by a Federal jurisdiction under our authority.

Q. The decision as to whether or not a case is prosecuted in the State or Federal courts, however, is not yours to make, is it?

A. It's the prerogative of the United States Attorney's office.

Q. It isn't the function in every instance of the local authority; is that correct?

A. That's correct.

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[fol. 168] RONALD E. SHERK, produced as a witness by the defendants, being first duly sworn by the Clerk was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name, Mr. Sherk?

A. Ronald E. Sherk.

Q. And, where do you reside?

A. Portland, Oregon.

Q. What is your occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. How long have you been an agent of the Federal Bureau of Investigation?

A. Since October, 1940.

Q. Now, how long have you been with the FBI here in Portland?

A. On this occasion two and one-half years.

Q. Immediately preceding this date?

A. Right.

Q. And have you been here on other occasions? Have you [fol. 169] been assigned here for duty on other occasion?

A. I was assigned here for duty in the years 1948 and '49 for a period of thirteen months.

Q. You, of course, were here during all of 1956?

A. Yes, sir.

Q. Are you a lawyer?

A. I am a member of the Oregon State Bar.

Q. Are you an accountant?

A. No, sir.

Q. They tell me you use the hunt-and-peck system in typing; is that correct?

A. No. I touch type.

Q. Mr. Sherk, did you execute an affidavit for a search warrant on September 5, 1956? I will identify that affidavit further by saying that it is what is known in this proceeding as a portion of Defendants' Exhibit 8.

Would you show that to the witness, please?

(Whereupon the Clerk shows the document to the witness.)

Mr. Crawford: Thank you, Mr. Clerk.

Q. I believe that is designated as Defendants' Exhibit 8-1?

A. Yes. I executed the original of this instrument.

Q. What time of the day did you make that affidavit?

A. As I recall, it was early in the afternoon.

Q. Where did you make the affidavit?

[fol. 170] A. In the office of the United States Commissioner, Claire Mundorff.

Q. Mr. Sherk, can you give us a more definite time when you executed the affidavit?

A. To the best of my recollection it was early in the afternoon of that day sometime prior to 2:30. I would say it was between 1:00 and 2:30 P.M.

Q. I believe you said it was executed before Claire Mundorff who is the United States Commissioner for this particular area?

A. Yes, sir.

Q. Did you secure a warrant based on that affidavit—a search warrant?

A. Yes, sir.

Q. There has been a search warrant introduced in evidence here marked Defendants' Exhibit 8-3.

A. 8-2.

Q. 8-2. Pardon me. You're right. 8-2. Did you execute that warrant?

A. Yes.

Q. When did you execute that warrant?

A. On the afternoon of September 5, 1956.

Q. Now, can you give us a more definite time as to when in the afternoon of September 5, 1956, you executed the warrant?

A. It was at 3:15 P.M.

[fol. 171] Q. 3:15?

A. According to the return on the warrant and according to my recollection.

Q. Now, how did you execute the warrant?

A. I executed the warrant by making a search of the safety deposit box at the First State Bank of Milwaukie named in the search warrant and by seizing the property that I found therein.

Q. What did you seize under the warrant?

A. I seized a Minifon brand wire recording machine.

Q. Just a moment. I am writing this down. Minifon?

A. Yes.

Q. All right.

A. Three spools of recording wire for the Minifon machine and five rolls of electronic tape recording.

Q. Referring to your affidavit in support of the search warrant being Defendants' Exhibit 8-1, it is stated in that affidavit that "Heretofore on May 22, 1956, in the State and District of Oregon I listened to portions of electronic tape recordings" et cetera "of conversations" et cetera. Now, where did you listen to those tape recordings?

A. In the little private office in the office of the Criminal Division of the Multnomah County Sheriff's Office.

Q. Do you know upon which floor that room is situated? [fol. 172] A. I guess—I get those floors mixed up. The jail is on one floor and this is—

Q. Seven?

A. This is the floor above the jail, if I recall correctly.

Q. Top floor?

A. Yes, sir.

Q. Who was present at that time?

A. At the time that I listened to the tapes?

Q. That's right.

A. Another agent and I were there in the room alone most of the time.

Q. Well, who was that agent?

. . . . . .

[fol. 174] The Witness: The other agent who was there was Special Agent Francis J. Smith. And the only other person who was in the room at all was Deputy Sheriff George Minielly. And he was there at the start and then he came and got the tapes at the end.

By Mr. Crawford:

Q. Now, I take it by your testimony, Mr. Sherk, there was a recording machine in this room?

A. Yes.

Q. No. I don't mean recorder—

A. Or, play-back; correct.

[fol. 175] Q. What do you call it?

A. Well, they usually refer to them as a recorder because of the fact that you usually use the same machine to play the tapes back that you use for recording them.

Q. Thank you. And, there was a recorder in the room?

A. Used as a play-back.

Q. Yes. Now, was there more than one recorder in the room?

A. I don't believe so.

Q. To your best recollection, Mr. Sherk—

A. I will say I am sure there was just the one machine there.

Q. —there was just the one machine? And, that recorder was being used, then, as a play-back for tapes?

A. That's correct.

Q. Electronic tapes? I want to give them their proper names. But, they were electronic tapes? There was no machine at that time on May 22, 1956, in that room that played back any wire recording, was there?

A. No. I saw the machine but we didn't play back any of the wire.

Q. Didn't play any wire recording at that time?

A. No.

Q. Just played tapes?

A. Right. In fact, just to—we just played one of the tapes.

[fol. 176] Q. Just played one tape?

A. One of the tapes, and only part of that one.

Q. Now, to make sure, Mr. Smith was present, yourself, and on the two occasions during that period of time George Minielly? No other person was present?

A. To the best of my recollection there was no other person present in that room. Of course, we were in the Sheriff's office. There were other people around. But, as

far as the tapes were concerned there were only those three involved.

Q. Tell me about that room. Was that room closed? Was the door closed, or was it open, or—

A. It was closed except when—it was closed except when Mr. Minielly opened it to come or go out.

Q. Who was in manual charge of the setup of the machine? Do you understand what I mean by "setup"? Do you know who was in charge of that feature?

A. You mean who put the tape on and who started it?

Q. Yes.

A. Mr. Minielly.

Q. Mr. Minielly. And, you heard one tape at that time and only part of that tape?

A. That's all we listened to.

Q. Now, what time of the day did that occur?

A. That was early in the afternoon.

[fol. 177] Q. Of May 22, 1956?

A. Correct.

Q. Now, early in the afternoon—that's kind of vague.

A. Rough. Specifically, as near as I can remember, it was between 1:30 and 2:00 P.M.

Q. Now, how did you happen to go over there, Mr. Sherk?

A. I was sent over there by my special agent in charge.

Q. That is Mr. Santoiana?

A. Yes, sir.

Q. Who operated the machine while the tape was playing?

A. I started and stopped it during the time that Mr. Minielly was out of the room.

Q. You say during the time Mr. Minielly was out of the room. Was there further—did he start it in the beginning?

A. He started it originally. It was his machine and he—

Q. Yes. I was going to ask you. Do you know who the machine belonged to?

A. No; I don't mean that it was his machine. I mean it was not our machine. I wasn't familiar with the machine prior to that time.

Q. In other words, it wasn't the United States Government's machine, it was—at least as far as you knew it belonged to the State of Oregon or Multnomah County or somebody else?

A. As far as I know it didn't belong to the United States
[fol. 178] Government.

Q. All right. Now, at that time—and I am referring to May 22, 1956—were any copies made of the tape or the portions of the tape that you heard?

A. Not to my knowledge.

Q. You did not make any copies?

A. No, sir.

Q. Do you know what day of the week that May 22, 1956, fell on?

A. It was Tuesday.

Q. I believe you have told us who was present at that time. It was Mr. Smith and Mr. Minielly, is that correct?

A. Yes. And myself.

Q. And yourself. Yes. Now, Mr. Sherk, is there any possibility of your being mistaken that the occurrence that you have just described; that is, the playing of the tape or a portion of the tape over in the Multnomah County Sheriff's office—is there any possibility that you could be mistaken as to the date?

A. There is always a possibility of a mistake. But, to the very best of my recollection it was Tuesday, the 22nd of May.

Q. Do you have any way of knowing definitely and positively that that occurrence occurred on May 22, 1956?

* * * * * * *

[fol. 179] A. Yes, I do. By fixing it to another date I recall that this was a Tuesday following the election week end when the tapes were seized because I remember reading about it in the paper. Then I recall that when I came down to the office Monday there was some discussion about it and that the following day we went over and listened to the tape.

Q. What was that discussion on Monday?

A. The discussion concerned the newspaper articles and they consisted of speculation as to whether those tapes did contain evidence of a Federal violation.

Q. Now, you said, I believe, that Mr. Santoiana, the special agent in charge of your office, directed you to go over

[fol. 180] on May 22, 1956, to the Sheriff's office of Multnomah County and hear the tapes. Is that a fair statement?

A. Yes.

Q. Now, how long did you stay at the Sheriff's office in Multnomah County where we are talking about on the occasion of listening to that tape?

A. Altogether about 45 minutes.

Q. What did you do then?

A. Then I returned to my own office.

Q. Then what did you do?

A. I informed my special agent in charge of what I had done over at the Sheriff's office and what I had heard.

Q. I didn't hear you.

A. I informed my special agent in charge as to what I had done over at the Sheriff's office and what I had heard.

Q. Did you make a report to your special agent at that time in writing?

• • • • • • •

[fol. 181] The Witness: Shall I explain it? I made an official report in the matter, not on that day but very shortly [fol. 182] thereafter.

By Mr. Crawford:

Q. Was that report in writing?

A. Yes, sir.

Q. Now, Mr. Sherk, heretofore the United States Marshal served you with two subpoenas, didn't he?

A. Yes, sir.

Q. Well, I am talking about the latter subpoena. And that was on April 8th, yesterday, Monday?

A. That was when I was to appear here, according to the latter subpoena. Well, I was served on Monday, as I recall it, to appear here on Tuesday.

Q. Do you have that subpoena with you?

A. Yes, I have it here.

The Court: I wonder if we have the original return? Has the Marshal made a return on the subpoena?

Mr. Crawford: He has so informed me that he has.

The Court: I think if we are going to make a record on this matter we had better have that original subpoena before us.

Mr. Crawford: Where is the Marshal?

The Court: Let the record show that the Court has taken from the official file of the matter what purports to be a subpoena to produce documents or objects addressed to Ron E. Sherk. Have it marked.

(Whereupon the Clerk marked a document purporting to [fol. 183] be the original copy of a subpoena to produce documents addressed to Ron E. Sherk as Defendants' Exhibit 10 for identification.)

The Court: This will be Defendants' Exhibit 10, Mr. Crawford.

Mr. Crawford: I will offer the return in evidence.

The Court: Show it to counsel.

(Whereupon the Crier did as requested.)

Mr. Luckey: No objection. I have no objection. But, I want to call to the Court's attention, Your Honor, that we did file a motion to quash the subpoena which I understand the Court conditionally allowed.

The Court: Yes. Well, I just want it for the file and the record letting it show we have the original. It will be received.

(Whereupon a document purporting to be the original copy of a subpoena to produce documents addressed to Ron E. Sherk previously marked for identification as Defendants' Exhibit 10 was received in evidence.)

. . . . . .

[fol. 184] By Mr. Crawford:

Q. On May the 22nd, 1956, at the time that you heard a tape or a portion of the tape in the Sheriff's office of Multnomah County, did you make any notes of what you had heard on the tapes?

A. Yes, I did.

Q. Do you have those notes?

. . . . . .

By Mr. Crawford:

Q. In what capacity did you make those notes?

[fol. 185] A. In my official capacity as a special agent of the Federal Bureau of Investigation.

Q. What were the words you used? "Member" or "official"?

A. I said in my official capacity.

Q. As a—

A. As a special agent, Federal Bureau of Investigation.

* * * * * * *

(Whereupon Mr. Crawford's previous question to the witness as follows; "Q. Do you have those notes?" was read by the Court Reporter.)

The Witness: I don't have them in my possession. They are in the file.

Mr. Luckey: You have answered.

The Court: He may answer that.

By Mr. Crawford:

Q. Continue. Finish your—

The Court: Finish your answer.

The Witness: They are in the files of the Federal Bureau [fol. 186] of Investigation.

By Mr. Crawford:

Q. In Portland, Oregon?

A. Yes.

Q. Mr. Sherk, I believe you testified that you made a report to your superior, Mr. Santoiana, after May 22, 1956; is that correct?

A. Yes.

* * * * * * *

[fol. 187] By Mr. Crawford:

Q. When did you make that report, Mr. Sherk?

A. Without refreshing my recollection, but to the best of my knowledge, I would say that it was made within one or two days after May 22, 1956.

Q. Does the report that you made pursuant to the investigation of May 22, 1956, to your superior, Mr. Santoiana, bear a date?

A. Yes. It bears a date.

Q. But, at this time you are not able to tell us the date of your own remembrance?

A. No.

Q. Now, the portion of the tape that you heard on May 22, 1956, at the time and place mentioned heretofore, what did that portion of the tape contain?

A. It contained recorded conversations between several different individuals.

Q. Who were the individuals that you speak of in that conversation?

A. Now, Your Honor, you must realize that I don't know.

The Court: Well, you just tell counsel that you don't know.

The Witness: I don't know who the individuals were.

[fol. 188] By Mr. Crawford:

Q. Now, Mr. Sherk, is it not a repetition—I am not trying to get you to say something that you don't know. All I want you to testify to is what you know. But, I must do this in a certain manner and if you will be patient with me in that regard—you heard conversations of a portion of a tape that contained conversations between certain individuals?

A. (Witness nods head.)

Q. Is that correct?

A. That's correct.

Q. Yes. Do you know the identity of the individuals in those conversations? Did you then—pardon me. Did you on May 22, 1956, know the identity of the individuals in those conversations?

A. Well, I had reason to think that I knew—recognized one of the voices. The other voices were unfamiliar to me.

Q. All right.

A. They were of persons with whom I had never had any conversation.

Q. Then, the individuals—you did not know the identity of the voices of the individuals with the exception of one?

A. Of my own knowledge.

Q. Of your own knowledge. Who was that one person whose voice you recognized?

A. William M. Langley.

[fol. 189] Q. Had you talked with Mr. Langley prior to that time, May 22, 1956?

A. Concerning this case or just talked to him?

Q. Well, let's say concerning this matter?

A. No.

Q. This case?

A. No.

Q. And that, of course, your answer would mean to include you had not discussed with Mr. Langley his, oh, supposed conversation on that particular tape?

A. No, sir.

Q. Now, had you talked with Langley prior to May 22, 1956?

A. Yes. I had met and talked with Mr. Langley and knew him in connection with my official duties in other investigations.

Q. Now, these other investigations that you speak of I take had nothing whatsoever to do with this particular case?

A. That is correct.

Q. It was not related—those previous conversations were not related in any manner or respect to the indictment of the present defendants in this case?

A. That's correct.

Q. And you say that on May 22, 1956, at the time of the playing of a portion of one tape you recognized Mr. Langley's voice?

[fol. 190] A. To the best of my knowledge, that was my belief at the time that it was William M. Langley's voice.

Q. Yes. Were you certain of it?

A. No.

Q. You were not certain of it. In identifying Mr. Langley's voice at that time; that is, May 22, 1956, the voice that you heard on the tapes, did you discuss with any other State official either from Mr. Langley's office or from the office of the Sheriff of Multnomah County but not necessarily confined to those offices any facts relating to that particular conversation?

* * * * * * *

The Witness: No.

By Mr. Crawford:

Q. Did anyone tell you that that was Langley's voice?

[fol. 191] A. No.

Q. Now, after hearing the tape did you discuss the conversation that you heard with Mr. Minielly?

A. No.

Q. Oh. Mr. Smith was with you at that time?

A. Yes.

Q. As far as you know of your own knowledge did Mr. Smith discuss it with any of the officials that I have mentioned?

A. No. I feel sure that he didn't. We were together and we were under instructions to go over there and listen to them and come back and report to the agent in charge and take no further action.

Q. Did Mr. Smith help you operate the machine?

A. To the best of my recollection I operated it.

Q. You did all of that yourself?

A. Uh huh.

Q. When that machine was played and the tapes—and you heard a portion of the tape was Mr. Smith in the room with you during the entire period of that time?

A. Yes.

Q. Now, did Mr. Smith in any way help you identify Mr. Langley's voice?

A. No.

Q. Was there any discussion at all between you and Mr. Smith concerning the identity of the voices on the tape that

[fol. 192] you heard?

A. Yes, I believe there was.

Q. What was that discussion at that time?

A. There were some notes accompanying the tapes identifying the individuals that were supposed to be speaking. Now, you asked me if I knew who the voices were and I honestly answered you that I did not. However we had some sort of an idea together from this key on this paper that accompanied the tapes. Did you hear me?

Q. Yes.

A. And there was discussion between Mr. Smith and I as to which conversations related to which names on the slip of paper.

Q. Was that piece of paper used or any piece, as far as that goes, used by you in helping you arrive at the conclusion that that was Langley's voice on the tape?

A. No.

Q. You made that identification from having heard Mr. Langley on previous occasion?

A. That is right.

Q. That is, your having heard his voice?

A. That's right. I reached that opinion just as I would reach the opinion that I was talking to you if I talked to you over the telephone. I wouldn't be sure, but I would be pretty sure.

[fol. 193] Q. Now, there was just one tape at that time and place?

A. One is all that we played.

Q. Oh. How many tapes were there in that room at that time that you saw?

A. I saw five.

Q. You saw five tapes. Were they enclosed in boxes?

A. Yes.

Q. Do you recall the color of the boxes?

A. I think there were different colors but to the best of my recollection they were a red and white, and blue and white; two different colored boxes. That's just my impression.

Q. How is your recollection as to the red-and-white boxes, is it fairly strong?

A. No. I wouldn't want to swear under oath as to the color of the boxes.

Q. I don't want to put you out on the end of a limb, or anything like that; I am just inquiring. Now, you said there was red and white—

A. That is my impression.

Q. — and blue and white?

A. I am not ready to swear under oath as to the color of the boxes.

Q. Do you have a recollection at this time as to the color of the box that contained the tape that you played?

[fol. 194] A. No.

Q. In the notes that you made on that occasion, Mr. Sherk, did you note the color of the boxes?

A. No.

Q. Mr. Sherk, please tell me this—and this is going to save some questions now—you played one tape or a portion of one tape?

A. (Witness nods head.)

Q. And at that time there were present at least four other tapes?

A. (Witness nods head.)

Q. Where were those tapes in the room, the remainder of the tapes?

A. Well, now, I want to be as honest with you as I can on it.

Q. You just tell me what you remember, Mr. Sherk.

A. My recollection of the matter is that Mr. Minielly brought all five of the tapes in and put them on the table where the recording machine was located. And, I don't know whether they stayed there the whole time or whether he left just the one tape that we played. It seems to me that he may have taken the other four back out.

Q. Did he designate which tape you were to play; that is, "he" I mean Mr. Minielly?

A. I don't remember.

[fol. 195] Q. How did you happen to play that tape at that time, Mr. Sherk?

A. I really don't know how the decision as to which tape to start on was arrived at.

Q. You didn't shuffle them?

A. No.

Q. Pick out one?

A. We had intended to listen to more of them so I don't think that it was a matter of picking out any one particular tape.

The session was cut short by circumstances that we didn't know about at the time that we started.

Q. What circumstance was that?

A. Well, I was informed that the Grand Jury wanted them.

Q. Who informed you?

A. Mr. Minielly.

Q. About what time in the afternoon did you see that information?

A. Well, I was thinking about this during recess. I think that I testified this morning that it was between 1:30 and 2:00 that I listened to the tape. As I think back over it, I think it was between 2:00 and 2:30.

Q. 2:00 and 2:30?

A. So, it was about 2:30 that Mr. Minielly came and said that the Grand Jury wanted the tapes again.

[fol. 196] Q. Then, let's correct your previous testimony. I have a note here that you heard this tape between 1:30 and 2:00 P.M. And, now—

A. 2:00 and 2:30, I think is correct.

Q. You want to change that to 2:00 to 2:30?

A. Please.

Q. How did you refresh your recollection during the recess, Mr. Sherk, as to this time element?

A. Well, I just got to thinking about it and remembered when I went over there after lunch and how the time ran and I figured it was about 2:00 to 2:30.

Q. Mr. Sherk, you have stated previously that you read about these matters in the newspaper prior to May 22, '56. That's what you testified to?

A. Yes.

Q. Did you read the newspapers in regard to this matter on Monday, May 21, 1956?

A. Yes, I read the newspapers about this matter every day.

Q. Every day?

A. Every day.

Q. There was quite a little coverage in the newspapers on this matter?

A. There was.

Q. Now, were you aware at the time that you heard the tapes that there was pending in the District Court of Mult-

[fol. 197] nomah County, Oregon, a proceeding to suppress certain evidence seized from the residence of Raymond Clark?

Mr. Luckey: If the Court please, I would object to that as immaterial and irrelevant.

[fol. 200] COLLOQUY

(At this point Mr. Crawford's last question to the witness Sherk was read by the Court Reporter.)

Mr. Crawford: Now, Your Honor, I am going to introduce evidence. Whether I can do it by—frankly, by witnesses who are hostile and adverse, whether I can get that out of them, I don't know. But, I have another way of introducing it if they fail to testify, as I have good reason to believe that they will testify.

Now, it will be along this line: on this motion to suppress things happened in there that Your Honor would scarcely credit. Let me just give you, briefly, the chronological time of that motion.

The Court: Now, I take it you are referring to the matter in the State court?

Mr. Crawford: In the State court, District Court.

The Court: There was no transcript of those proceedings?

Mr. Crawford: Yes, I have a transcript.

The Court: All right.

Mr. Crawford: And at the appropriate time I intend to introduce a certified copy of those transcripts so Your Honor can see these various steps.

The Court: Very well.

Mr. Crawford: Now, bearing in mind that the first judicial day after the raid was Monday, May 21st, at that time [fol. 201] Mr. Fallgren on behalf of the defendant Clark and I on behalf of an ancillary defendant by the name of Martin—Sonny Martin, appeared in front of Judge Mears who had issued the search warrant upon the affidavit of Mr. Langley which is in evidence herein and presented a motion which, in effect, was a motion to suppress and return the seized property.

Now, we tried all during Monday to have the property itself, which included these tapes, and the evidence now in possession of the Government to be brought into open court so that we could identify them so that the Court could examine them so the Court could see for itself what was taken on the raid. If you ever saw a round-around you will find it in the transcript of that proceedings.

The Court: Of course, you understand this Court does not have appellate jurisdiction.

Mr. Crawford: I know you don't. But, I believe, as I will demonstrate later—at least, I am really going to make a try—it won't be for want of trying that Your Honor should be intimately familiar with the proceedings in the State court so as to arrive—to help you arrive in a determination of a proposition of law that I shall present to you at the close of the case.

Now, we just couldn't get that stuff in the court. It just couldn't be done. We subpoenaed everybody we thought—[fol. 202] everybody we could serve. We chased Mr. Langley all around that courthouse. He just absolutely ignored the orders of the Court to appear there even and never did appear.

The other day when he appeared in this courtroom is the first time since March 17, 1956, that he has ever been on a witness stand—May 17, 1956, that he has ever been on a witness stand.

Now, we asked these people—and we will show—we asked Mr. Howlett, we asked Mr. Lonergan, I believe, we asked Mr. Minielly, we asked Mr. Schrunk, and of all the run-arounds that a group of lawyers ever got in a so-called judicial proceeding, we got it.

Now, that is the reason that I asked Mr. Sherk whether or not at the time Mr. Minielly told him that these tapes were wanted for the Grand Jury that he was aware that there was a motion to suppress the very evidence that he was examining going on down in State court. From that I will develop the fact that we had made a demand upon the Sheriff and his deputies and the District Attorney and his deputies and we got no place. We were given all sorts of excuses as to where those tapes were. You wouldn't believe it unless you read it. So, I asked this witness—I want to know whether he knew of his own knowledge at that time that a motion was pending in a court which had jurisdiction over the identical tapes to suppress the same and whether [fol. 203] or not he knew that the Court had made an order that they were to remain in the custody of the Sheriff. Those words appear in the transcript. You see? Now, I understandably, Your Honor, want to know everything that

this witness knows about the State proceedings in that regard because I think by the time you conclude this proceeding—and I confidently predict that I will present to Your Honor a sad commentary on State justice in this matter. Now, Your Honor, I notice that these newspaper men are taking these things down. I did not ask that the press be excluded. I would not have the witnesses excluded and then have them read about it in the paper until I had had a chance to examine them. Otherwise, I would have gone in chambers and asked that the press be excluded.

The Court: That is just the reason why the Court wouldn't go into chambers, Mr. Crawford.

Mr. Crawford: Yes.

The Court: No. I don't propose to make any statement with reference to the press. All I can is that the management of the respective presses shall run their newspapers and I shall run my court to the best of my ability. If they encroach upon somebody's right that is their doing and not mine. That's all I propose to say about it.

Mr. Crawford: I have attempted in just a few minutes here to give you the over-all picture of what we—and, I [fol. 204] must say that thus far in the proceedings I have learned the facts that I never knew before as—for instance, I never knew—and when you read the transcript you will understand why I didn't know—

The Court: Well, let me ask you this, Mr. Crawford: I take it that we wouldn't have any further interest in the matter if the witness Mr. Sherk would say No, he had no such information, and we would only have further interest in the matter in the event he said Yes.

Mr. Crawford: We would certainly have a lively interest in that if he said that.

The Court: If he said Yes. Please advise me, what difference does it make whether he did or did not know?

Mr. Crawford: Oh, now, this is the 22nd of May. You heard Terry Schrunk testify yesterday that he notified the F.B.I. on the 21st. I will introduce, however, other evidence which shows that a Federal prosecution was contemplated from the beginning. And I think I can show by documentary evidence that such a Federal prosecution was contemplated as early as the 18th of May.

The Court: By whom? Contemplated by whom, sir? The Federal Government?

Mr. Crawford: It says Federal prosecution. Well, who generally prosecutes them?

Mr. Morrell: Well, I hate to interrupt, Your Honor—

[fol. 205] The Court: Yes.

Mr. Crawford: Wait. I am not saying that Mr. Luckey—that I will produce any documentary evidence that Mr. Luckey contemplated a Federal prosecution.

The Court: I see.

Mr. Crawford: I am not required to go that far—

The Court: No.

Mr. Crawford: Under the case which I will argue later. But, I merely say that I will show that I have some evidence, for whatever it is worth, that a Federal prosecution was contemplated, not on the part of the Federal authorities.

Mr. Luckey: That's what we—

The Court: That's what I wanted.

Mr. Crawford: Not on the part of the Federal authorities.

The Court: State authorities or Federal authorities? That's what I had the question about.

Mr. Crawford: Yes. But, there was a statement made in writing and in open court as early—no. It was made on May 22nd. But, it was from a letter dated May 18th where the letter stated that this contained Federal violations of the Federal Communications Act, you see. Now, that is just one portion of the evidence.

The Court: Yes.

Mr. Crawford: I have other evidence which I am—by the time we get it all in we will have this fitted together so [fol. 206] we can see whether or not it comes within any of the various rules which have—or, various rules or situations, let us call it, where our Supreme Court has said that under those situations that a motion to suppress is to be granted.

I intend to do that and that is the reason why I don't think that I am inquiring unduly and irrelevantly of the witness Sherk. If he says No then I am not—certainly am not going to repeat that question. If he says Yes then I am

going to ask the question as to what extent, and so on and so on and so on he knew.

Mr. Luckey: If Your Honor please, I don't believe there is any statement of counsel that shows any materiality to this matter. And, by counsel's own statement here that the Federal Government contemplated no procedure, by counsel's remark I would think that a lot of the inquiry that's being sought of the Federal officers is at this stage shown to be irrelevant. In the first instance counsel was allowed to proceed with this inquiry after objection on the basis that he would on his representation connect it up. Now at this time he has told Your Honor that the Federal authorities didn't contemplate anything in advance of this search and seizure.

I suggest that, certainly, the matters from here on and at this point should be confined to matters that are relevant and material to the inquiry and under the law of search and seizure by Federal officers.

[fol. 207] Mr. Crawford: Your Honor, might I say—

The Court: I don't think Mr. Luckey is finished. Just a moment. Is there something further?

Mr. Luckey: Well, the only possible suggestion, Your Honor, is that even the letter that counsel mentioned is supposed to have been dated May 18th. The seizure was on May 17th.

The Court: I didn't catch that. Maybe you can advise me who wrote that letter.

Mr. Luckey: He didn't mention it, Your Honor.

The Court: I see.

Mr. Crawford: Your Honor, we don't have a jury here and I am sure that Your Honor is experienced enough to separate the wheat from the chaff when that occasion arises. I am sure that we have acquainted Your Honor with various theories upon which searches and seizures have been held invalid and evidence suppressed.

The Court: Well, I am satisfied. Now, at the outset it was indicated that the Court felt that you had the right to bring out all information and search for any evidence that would tend to establish, if it would, that the Federal authorities—and, I think we pretty-well have restricted it to the Federal Bureau of Investigation and its agents—had

knowledge of and participated in the actual search and seizure. And, I think that you are entitled to have that.

Now, the question before this witness is did he know on [fol. 208] May 22nd that an application had been made on the preceding day of May 21st for suppression of the evidence under the theory that the search and seizure had on the night of May 17th and possibly going into the early morning of May 18th—I don't know. But, I think it was accomplished on May 17th. I don't feel that tends to prove or disprove what information or what action the F.B.I. may have had or may have taken at the time of the raid.

So, I will sustain the objection made to the question as to whether or not this witness Sherk knew on May 22nd the time he was listening to the tapes that there was an application pending in the District Court of the State of Oregon for Multnomah County for a suppression of the articles as evidence received in the raid. That's all.

. . . . . .

[fol. 210] STATEMENT BY MR. CRAWFORD

Mr. Crawford: Your Honor, I have a very short statement to make to the Court which might clear up a lot of objections in the future in this proceeding.

. . . . . .

Mr. Crawford:

Your Honor, in eliciting from the various witnesses [fol. 211] called and to be called—I think it appropriate at this time to state very briefly and quite generally our theory of law in this motion to suppress. We are proceeding upon several theories.

It is our understanding of the law, and we will produce authorities to bolster that at the conclusion of this hearing, to the effect that the evidence to be obtained by a search and seizure; that is, an illegal search and seizure, by the State officers will be suppressed in a Federal court if there was Federal participation therein. I don't think anyone can quarrel with that. As to just how much, when such participation must be shown will be argued from the cases.

Another theory is that if there exists between State officials and Federal officials a common understanding and general practice that evidence seized by State officials will be adopted and used in a Federal prosecution, the Court will in such a case suppress the evidence upon timely motion.

We will contend on another theory that the State's search of May 17, 1956, is so corrupted by illegality and of criminal intentions on the part of the State officials to violate the constitutional rights of the defendants herein that even though the State officials may disclaim such an idea, that they knew and must have known that no successful State prosecution could have arisen based upon the seized items in the State way and that there the sole and [fol. 212] only object of the unlawful search was to cause a Federal prosecution to have been made.

Finally, we are attacking the validity of the Federal search itself and the steps taken under it.

Now, that generally is the four theories that we are proceeding upon so we may state plainly and fairly to Your Honor the manner in which we are going about to produce evidence to support any and all of those theories. We are not waiving any of them.

* * * * * * *

(At this point Mr. Sherk, the witness, resumed the witness stand.)

The Court: You may proceed.

* * * * * * *

By Mr. Crawford:

Where was I, Mr. Reporter?

The Court: The Court sustained the objection.

[fol. 213] Mr. Crawford: Does the Court still sustain the objection?

The Court: Yes.

Mr. Crawford: In view of the further statement I made?

The Court: Yes. The Court abides by its ruling.

* * * * * * *

[fol. 214] By Mr. Crawford:

Q. Mr. Sherk, I have asked you some questions in regard to the boxes that the tapes were contained in. I believe there were five in number?

A. Yes, sir.

Q. At that time, meaning on May 22, 1956, at the hour which you stated, did you take into your possession the tape that you heard or any of the tapes that you saw?

A. Would you be a little more specific about that?

Q. Well, yes. I see what you want. By "possession" I meant did you take the tape which you heard with you when you left the courthouse or did you leave it at the courthouse?

A. No. I did not take it with me. I left it at the courthouse.

Q. Would your answer be the same in respect to the other four boxes?

A. Yes.

Q. Do you know who did take them into their possession after you saw them?

[fol. 215] A. Mr. Minielly.

Q. Mr. Minielly. Mr. Sherk, after the occasion on May 22, 1956, to which you testified, did you again hear that tape that you heard on that day?

A. At any time since that time?

Q. Yes?

A. Yes.

Q. No. I mean, after May 22nd?

A. At any time from May 22nd to this day?

Q. On, yes?

A. Yes.

Q. All right. After May 22, 1956, when is the first time that you again heard that tape or any of the other tapes, if you did hear any of the other tapes?

A. A few days after September 5, 1956.

Q. Now, a few days after September 5, 1956, you again heard a tape. Was it the same tape that you heard on May 22, 1956?

A. Yes. I heard that same tape again.

Q. Now, what other tapes did you hear after September 5, 1956?

A. Well, I listened to all of the—I listened to everything that was on all five tapes and everything that was on the spools of wire.

Q. That was after you executed the search warrant?

A. Yes, sir.

[fol. 216] Q. Let's go back to the May 22, 1956, date again. You have related one occurrence between 2:00 and 2:30 P.M. on May 22, '56, on which occurrence—at which time, I should say, you heard a portion of one tape. Now, let me ask you this question: After you heard the tape on May 22, 1956, during the remainder of that day did you hear any of the tapes?

A. No.

Q. Then, is it a fair statement to say that on May 22, 1956, at or about 2:00 o'clock to 2:30 o'clock P.M. you heard a portion of one tape and that thereafter not until after you had executed the search warrant did you ever hear any of the tapes; is that correct?

A. That is correct.

Q. Thank you. You testified, Mr. Sherk; at least, I recall this much, that on the box that contained the tape that you played there was a note; is that correct?

A. In the box.

Q. In the box?

A. In the box.

Q. And is that true of the rest of the boxes?

A. Yes.

Q. Did you examine them?

A. Yes.

Q. Did the rest of the boxes contain notes?

[fol. 217] A. Yes.

Q. They were not attached to the box but in the box?

A. That's right.

Q. They were not pasted or stapled to the box, they were just in the box?

A. That's right. They were loose piece—there was a loose piece of paper in each one of the boxes with the notes that I have described on them.

Q. The same way that the tapes were in the box; that is, just placed in there?

A. Yes.

Q. Now, were there notations upon those pieces of paper?

A. Yes.

Q. Let's take the tape that you heard. We will call that number 1. Did that have anybody's name on that note that was in the box?

A. As author or just—

Q. Well, what did the note say?

A. Well, it was in abbreviated form and it purported to list the date that the tape was taken, the time of day, as I recall, and the individuals whose conversations were recorded.

Q. All right. Now, on that tape number 1 what were the names of the individuals on that note?

A. From my recollection I can't guarantee to be entirely [fol. 218] complete but I remember a number of them.

Q. What was on the one that you played?

A. That's what I am speaking of.

Q. Yes?

A. Maloney, McLaughlin, Sheridan, Gamruth, Langley, Maloney's son, McLaughlin's son.

Q. Maloney's son. Do you know Mr. Maloney's son's name? Ricky?

A. Yes. That's right. Ricky. Now, that was not on the slip. I don't think that was on the slip. That was in the conversation that I overheard on the tape.

Q. Oh. I just wanted the information that was on the note.

A. Yes. That's it which I first gave it is all that I can remember being on the notes.

Q. Then, it would be Maloney, McLaughlin, Sheridan, Gamruth, and Langley, was on the note?

A. Maloney's son and McLaughlin's son.

Q. Those words "Maloney's son" and "McLaughlin's son" were on the notes?

A. Or, abbreviations to that effect, as near as I can recall. Now, if I may explain—

The Court: You may.

The Witness: —I have listened to these tapes on more than one occasion and I may be confused.

By Mr. Crawford:

Q. I am only inquiring as to that date.

[fol. 219] A. I may be confusing what is on the note with what I have heard on the tape. But, to the best of my knowledge those are the names appearing on the note.

Q. To the best of your recollection?

A. Yes.

Q. Well, at that time you made notes of your own, did you not?

A. Yes.

Q. Did you make notes of the names of the persons whose names you have just given?

A. Yes, I did.

Q. Those were on your notes?

A. Yes, sir.

Q. And, you then subsequently made a report to your superior, is that correct?

A. Yes.

Q. In the report to your superior did you list those names?

A. Yes.

Q. Now, let us go to the other four tapes. Did they contain notes—similar notes?

A. Yes.

Q. At that time did you in the notes that you made note those names?

A. No.

Q. When is the soonest date after May 22, 1956, that you [fol. 220] did make a note of the names contained on the notes in the other four boxes of tapes?

A. On or after September 5, 1956.

Q. Now, speaking only as to the remaining four boxes of tapes, and speaking as of the date of September 5, 1956, after you executed your search warrant on that day, did you then make notes or a record concerning the notes that you found in the four boxes of tapes?

A. No; not as such.

Q. When did you if you did?

A. No. I never made any notes or reports concerning the notes in the boxes as such.

Q. Did you include them within reports concerning the tapes?

A. I made reports concerning the contents of tapes.

Q. Did that necessarily include the information contained on the notes?

A. Well, my reports concerned what I heard on the tapes. They necessarily included the same conversations that were included in the notes.

Mr. Luckey: If the Court please, I would like to ask the Court if we might be advised by counsel under which of his three theories this inquiry is proceeding, if on any of them at all. The fact that the agent may have made notes with reference to what he found in the box would not be evidentiary, as far as I can see. And I fail to see the [fol. 221] purpose of counsel's.

The Court: What do you claim for it, Mr. Crawford, so counsel may be advised?

Mr. Crawford: Well, Your Honor, now, again, I say I plainly and unequivocally stated the position that I was taking at the beginning and I don't want to state it at this time. I believe, and I truthfully say to Your Honor, that these questions are included among the four theories which I have heretofore propounded.

The Court: All right. I will accept your statement. However, we are now talking about something that transpired on September 5th after the date of this search and seizure by the F.B.I.

Mr. Crawford: Yes, Your Honor, that is correct.

The Court: However, I am not faced with any objection. But I will entertain what objections there are with reference to those conversations; that is, information obtained after the Federal search and seizure upon the statement that you have made.

Mr. Luckey: I would further object, Your Honor, on the ground that the questioning concerns a matter that occurred after the Federal search and seizure.

The Court: Yes. That's what I was relying on.

Mr. Crawford: Your Honor, may I put it abstractly to Your Honor that we do not feel that we should be cut off [fol. 222] arbitrarily as of, say, 3:15 P.M. of September

5, 1956, for the reason that an interrogation of witnesses, not necessarily this one, but other witnesses, may bring to light evidence which would support our fourth theory.

Mr. Luckey: I feel—

The Court: In that connection, any development that you wish dealing with the State search and seizure or any information—

Mr. Crawford: That wasn't the State search and seizure, that was the Federal search and seizure, the fourth theory.

The Court: I can understand counsel's argument about it. But, I hope it is not arbitrary. Of course, the Court hasn't made any ruling yet because there is nothing for the Court to rule on. But, I have just indicated it appears now that any information that might have been received concerning these tapes from an actual date of seizure of them by Federal authorities has nothing to do with the search and seizure conducted by the Federal authorities and tends to seek disclosure of evidence upon which the Government might rely upon its prosecution of the indictment here.

Mr. Crawford: I assure Your Honor that that is not my purpose but only—well, I can't state it without—

The Court: I think I understand your position, Mr. Crawford.

Mr. Crawford: Would you read the question, please? [fol. 223] Please don't answer the question.

The Court: It has been answered.

The Witness: I have answered it.

(Whereupon Mr. Crawford's last question to the witness and the witness' answer thereto were read by the Court Reporter.)

By Mr. Crawford:

Q. Well, let me be sure that I have covered this and I will drop it. Now, before September 5, 1956—and I mean before that—I mean up until the time that you executed your affidavit in support of the search warrant, you had not heard the five tapes or the four tapes not had you made any notes concerning the notes contained in the tape boxes, is that correct?

A. That's correct.

Q. Yes. Now, your heard one tape or a portion of the tape only on May 22nd. We are only going to talk about that tape. Did that portion of the tape you heard on May 22, 1956, contain telephone conversations?

A. In my opinion it undoubtedly did.

Q. Now, were you able to determine at that time if the telephone conversations were picked up by means of a room conversation; that is, a tape into the room generally?

A. Well, that would be a matter of opinion, wouldn't it?

Q. Well, I don't know. I assure you, Mr. Sherk, I [fol. 224] couldn't tell myself. I wanted to know if you knew.

A. Let me answer it in this way: There were, apparently, two different types of conversation on that tape. In one type of conversation there was considerable echoing, sounds of doors slamming and doorbells ringing and the things that you would think would be room noises. On certain other parts of the tape those noises were absent but there were other sounds such as the buzzing noise that one hears when a telephone rings, there were what appeared to be long-distance operators and secretaries handling telephone calls and calling people to the telephone. So that it is my opinion based on what I heard that part of the content of that tape that I heard was a so-called room recording and part of it was a recording of telephone conversation.

Q. Thank you, Mr. Sherk. I must ask you another question in regard to the notes in the boxes. Did you, on May 22, 1956, know whose writing was on the notes?

A. No, sir.

Q. Or who wrote the notes?

A. No, sir.

Q. You saw no person write those notes?

A. No.

Q. So, as far as you know of your own knowledge at that time you did not know who wrote the notes?

A. Of my own knowledge, no.

[fol. 225] Q. Of your own knowledge?

A. No.

Q. I call your attention, Mr. Sherk, to your affidavit. You make affidavit as follows—and I am going to read to you from that affidavit: "I, Ronald E. Sherk, being first duly sworn, depose and say that I am a Special Agent for the Federal Bureau of Investigation and reside at Portland, Oregon; that heretofore on May 22, 1956, I listened to portions of electronic tape recordings"—in the plural —"of conversations" in the plural—"which recordings"—in the plural—"contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than the senders of such messages and the benefit of a person or persons not entitled thereto in violation of Title 47, Section 605, U.S.C.A."

Mr. Sherk, how did you know on May the 22nd, 1956, that any conversations that you heard at the time and place previously mentioned were intercepted telephone conversations?

A. Well, I have answered that question as best I can. I believe beyond any doubt that they were recorded telephone conversations for the reasons that I previously stated and I will be glad to repeat them for you.

Q. I don't think you caught all my question, Mr. Sherk. My question was how did you know on May the 22nd, 1956, [fol. 226] that the portions of recorded conversations that you heard were intercepted telephone conversations?

A. Well, they were not live telephone conversations, they were recorded. And, therefore, they must have been intercepted.

Q. Did you have any idea of your own knowledge that they were intercepted other than the reason you have just stated?

A. Would you care to be more specific?

Q. Well, I am directing my question, frankly, at the use of the word "intercepted." You know that it is contained in the section of the statute, 605, do you not?

A. (Witness nods head.)

Q. You must know, do you not, that the word "intercepted" has a definite legal connotation because you used it in your affidavit in connection with the statute. Now, how did you know on May 22, 1956, that the telephone conversations to which you listened were intercepted?

A. Well, I felt then and I feel now that the fact that they were there recorded on the tape was proof that they had been intercepted within the meaning of the statute.

Q. All right. Now, this is a question that you said that you did not understand. You have stated the reason that you felt that they were intercepted was because they were recorded on tape. Do you have any other reason to believe that they were intercepted?

[fol. 227] A. I have reason to believe but not of my own knowledge.

Q. Not of your own knowledge?

A. I was not there and did not see them recorded.

Q. Now, did you have within your knowledge any facts other than the tape that you listened to which caused you to believe that the telephone conversations that you listened to were intercepted within the meaning of 605, U.S. C.A.?

A. Isn't that exactly the same question you just asked?

Q. Just stated differently.

A. The answer is the same.

Q. Thank you. Now, on May the 22nd, 1956, referring again to the time at which you listened to the tapes, Mr. Sherk, and on that date you aver further on your affidavit in the next part of the same sentence you continue "designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto in violation of Title 47, Section 605, U.S.C.A." Now, what facts did you have in your possession—and by that I mean knowing—what facts did you know which caused you to believe that the intercepted telephone conversations which you heard on that date were designed or intended for the use or benefit of a person other than the senders of the messages and also in violation of the said section? What facts did you have in your possession?

A. Well, now, counsel, in the first place that particular [fol. 228] section probably refers to the date when the affidavit was made, don't you agree?

Q. No. I will read the whole sentence so you will know.

A. Counsel, my point is that I made the affidavit stating that I had heard these recordings and that they were recordings that were—

Q. Now, you read that very carefully, please, Mr. Sherk.

A. Yes. Well, I think the answer would be the same but my point was just a legal one. It would be entirely possible that I wouldn't have heard a thing concerning this case or read anything about it in the presence or received any complaint from any citizens at the time I heard the tape. Yet, between that time and the time I executed this affidavit I could very well have received such information so that it would enable me to tie it up with this other element that you speak of.

Q. Well, why?

A. So, I think the pertinent date would be the date that I executed this affidavit.

Q. Well, now, I am not going to get into an argument. I am going to have to argue probably that point with two very able counsel here, Mr. Sherk, So, I am not going to argue with you.

I simply point out—I simply asked you the question: What facts did you have in your possession and what was [fol. 229] the extent of your personal knowledge that the intercepted telephone conversations were designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto in violation of Title 47, Section 605 U.S.C.A.? What was up here (indicating)? What did you have that you knew of your own knowledge?

A. May I ask the Court to take judicial knowledge of the statements in the public press?

The Court: Well, I think counsel ought to advise you on what date he has reference to.

By Mr. Crawford:

Q. As of May 22, 1956?

. . . . . .

[fol. 230] A. First, the considerable publicity in the public press concerning tape recordings allegedly, according to the press, made by the same defendants that are here present. Secondly, the fact that the tapes were obtained by the Sheriff's office, so they told me, from a source other than the parties to the conversations appearing on the tapes.

Q. That is what the Sheriff's office told you?

A. Yes.

Q. All right. Is that it?

A. Period.

Q. Have you executed—I mean, have you made out many affidavits in support of search warrants, Mr. Sherk?

A. A few. Would you care to be more specific?

[fol. 231] Q. Well, in the performance of your official duties you are required to make searches and seizures, are you not?

A. Well, I have made out affidavits for search warrants before.

Q. And you are a lawyer? You are a member of the Oregon State Bar?

A. Yes, sir.

Q. Now, you further say in your affidavit, "I am positive said recorded conversations and evidence of such intercepted telephone messages are among five electronic tapes" —or, "five tapes of electronic tape recordings." Now, at that point are you referring to the tape recording that you heard on May 22, 1956, in that sentence or in that portion of the sentence?

A. You're making a distinction between singular and plural. It could very well be said that a number of different telephone conversations could be a number of recordings. I have already testified that I listened to only part of one tape and that is correct.

Q. Yes?

A. And that is what I was referring to when I made this out (indicating).

Q. Now, that isn't what I had in mind. I'm sorry. I probably did not state it clearly. I will ask you again. In reference to the portion of the sentence which I just [fol. 232] read to you you used the words "said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recording." Now, when you speak of "said recorded conversations and evidence of such intercepted telephone messages" are you referring to the portion of a recording which you heard on May 22, 1956, in the Sheriff's office in Multnomah County, Oregon?

A. Yes. I understood your question and the answer is Yes.

Q. Thank you. Now, at the time that you viewed the five tapes over in the Sheriff's office on May 22, 1956, did you see a Minifon recording machine over there?

A. Yes, sir.

Q. And, did you see four spools of Minifon recording-machine wire at that time and place?

A. How many spools?

Q. Four spools of Minifon recording-machine wire?

A. As near as I can recall it was three spools.

Q. Well, did you make a mistake in the affidavit and say four when you really meant three, or what?

A. I see what you mean. Three is all I remember.

Q. Where did you get the four? Do you have any idea?

A. I honestly don't know. Maybe I thought there were four at the time.

[fol. 233] Q. Well, you're again basing that on what you saw on May 22, '56?

A. May 22, '56.

Q. Yes. Is that correct?

A. That's correct.

Q. Now, when is the first time, Mr. Sherk, that you played the spools of Minifon recording-machine wire or listened to the spools of Minifon recording-machine wire?

A. Oh, on or after September 5, 1956.

Q. And that was after the search?

A. Yes.

Q. After you removed them from the box 912 at the First State Bank of Milwaukie?

A. Yes.

Q. Mr. Sherk, I am not belaboring this point but again on May 22, 1956, you heard a portion of one tape only. Why did you ask for five tapes in your affidavit for your search warrant?

A. Because there were five there. I couldn't be sure which one contained the conversations that I had heard and I had reason to believe that all five of them contained intercepted telephone conversations.

Q. Why did you have reason to believe that all five of them contained intercepted telephone conversations?

A. Because the notes on all five boxes were similar and [fol. 234] because I had been informed by the Sheriff's office that they contained intercepted telephone conversations.

Q. Then, you relied, then, in making this affidavit in this particular respect upon at least in part what someone else told you concerning those tapes, is that correct?

A. In part, yes.

Q. Yes. Did the notes themselves say they were intercepted telephone communications?

A. No, they did not.

Q. Did they say telephone on the notes?

A. No.

Q. Now, let's go to the spools of Minifon recording-machine wire, Mr. Sherk. Were there any notes on the spools of wire?

A. No.

Q. You never heard the spools of wire played until after you secured them under the search warrant, did you?

A. No.

Q. Then, of your own knowledge—up here (indicating)—of your own knowledge you did not know that the four spools of Minifon recording-machine wire or three, we are not going to quibble about it, you did not know that they contained anything, did you?

A. Only what I had been told.

Q. In other words, you were depending entirely upon what someone else told you in regard to the Minifon?

[fol. 235] A. Plus the fact that the machine is designed for intercepting communications.

Q. Well, it is also designed, is it not, to pick up, we will say, symphony music? It could?

A. Yes.

Q. I could have one here under my coat, couldn't I, and be recording this thing right now?

A. Yes.

Q. I haven't. But, I could, couldn't I?

A. Yes.

Q. Now, Mr. Sherk, I am going to read all of the third sentence in your affidavit so that we may get at that. "I

am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one Minifon recording machine and four spools of Minifon recording-machine wire which said properties containing evidence of such recorded intercepted telephone conversations are located in safety deposit box 912 in the First State Bank of Milwaukie at 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive they are so situated."

Now, with that in mind I wish to ask you a few questions about this. Did you have a key to the safety deposit box [fol. 236] numbered 912 at the First State Bank of Milwaukie, Oregon?

A. No.

Q. Did you have access to that box in the regular course of business?

A. No.

Q. What kind of access did you have to the box if you had any?

A. You mean when if any time did I enter the box and inspect the contents?

Q. Yes?

A. To the best of my recollection it was August 13, 1956.

Q. August what?

A. August the 13th.

Q. August 13, 1956?

A. (Witness nods head.)

Q. When you entered the box—

A. I am speaking of—that is, the only time prior to September 5th.

Q. Well, then, is it fair to say that is the only time that you saw the contents of that box?

A. Prior to the search.

Q. Prior to the search. And, that was on August 13, 1956?

A. (Witness nods head.)

Q. Now, Mr. Sherk, in view of the evidence that is in [fol. 237] this record I want to have you state—and please do not state otherwise except with complete certainty—

as to that date. Are you able to do that? Are you able to fix that date August 13, 1956, with complete certainty?

A. No. No.

Q. You are not?

A. On or about. On or about.

Q. Do you have any means by which you could fix that date?

A. Yes.

Q. What is that means?

A. I could check the entry records into the safety deposit vault and see what day on or about August 13th access was had to the box.

Q. Do you have any other method by which you could ascertain that date with certainty?

A. No.

Q. That is the only way you could, is that correct?

A. That's what I testified. Yes. That's correct.

* * * * * * *

[fol. 239] By Mr. Crawford:

Q. Mr. Sherk, as of, again, May 22, 1956, you received some information, I believe it was, through the use of the notes in the boxes of the tapes concerning the names of individuals whose conversations were purported to be recorded upon the tape that you heard on that date?

A. Let me see if I understand your question. You're asking, were there notes in the boxes that I read that purported to show the names of the people whose conversations were on the individual tapes?

[fol. 240] Q. I am speaking of the tape that you heard.

A. Oh. There was a slip in the box of the tape which I heard which purported to show the names of the individuals whose conversations were recorded.

Q. On that tape?

A. On that tape.

Q. All right. Now, we have those names, I think. Maloney, McLaughlin, Sheridan, Gamruth, Langley, Maloney's son and McLaughlin's son. Now, the names of those individuals were on the note in the box of tape which you heard?

A. Yes. You understand that I am speaking from memory and those names may not necessarily be in that form?

Q. All right.

A. Some places in the notes it could contain notations like this "Tom to Murray," maybe, instead of "Maloney to Gamruth." Now whether they were named by last names or by an abbreviated name, I can't testify of my recollection at this time.

Q. Well, for the sake of this questioning let us assume that they are as I have stated to you to make our questioning much easier.

A. Very well.

Q. Though I am unwilling to concede that "Tom" necessarily means "Tom Maloney." But, however, for the sake of this questioning let us concede that.

Now, when did you talk with Mr. Maloney—Tom—I [fol. 241] think his full name is Thomas E. Maloney. When is the first time you talked with him concerning this particular tape?

A. The first time I personally—

Q. Yes?

A. —talked to him? It was when he appeared in answer to a subpoena before—to appear before the United States Grand Jury in this matter.

Q. So, when you said "Maloney" you mean Thomas E. Maloney, the person who appeared before the Grand Jury?

A. Yes, sir.

Q. And, is he also the person whose name is stated in some of the counts of the indictment?

A. That is my understanding.

Q. That's the first time you talked with him was when he appeared as a witness to testify in front of the Federal Grand Jury which met on—when? It certainly was after the date of the search warrant?

A. It was this year. Early in 1957.

Q. In '57?

A. Yes.

Q. All right. That's Maloney. Now, Mr. McLaughlin, when is the first time you talked with Mr. McLaughlin?

A. On that same day and on that same occasion.

Q. And, again, my question goes to the purported con- [fol. 242] versations of these individuals on that particular tape, you see? You understand that?

A. Yes.

Q. Yes. Now, Mr. Sheridan, when did you talk with Mr. Sheridan?

A. I have had conversations with Mr. Sheridan several times over the past several years.

Q. Well, now, I mean in relation with this particular tape?

A. I see.

Q. Yes?

A. I personally?

Q. Yes?

A. Not some other agent?

Q. No. No. You?

A. At the Grand Jury in the early part of 1957.

Q. And, that was the soonest time after May 22, 1956, that you talked with Mr. Sheridan concerning any purported conversation that was on that particular tape?

A. Yes.

Q. Now, Mr. Gamruth, when did you talk with Mr. Gamruth?

A. I have never talked to Mr. Gamruth.

Q. Never?

A. Never met him.

Q. Yes. Mr. Langley? When did you talk with Mr. [fol. 243] Langley concerning that particular conversation on that particular tape?

A. I believe that I talked with Mr. Langley first concerning this particular matter about a week after May 22, 1956.

Q. Now, Mr. Maloney's son, when did you talk with him?

A. I have never talked to him and don't know him.

Q. Of course, that is in connection with this particular tape?

A. I have never met him and never talked to him.

Q. Never have talked to him?

A. (Witness shakes head.)

Q. And, McLaughlin's son?

A. I have never met him and have never talked to him.

Q. Now, what was the conversation with Mr. Langley concerning this particular tape?

. . . . . .

[fol. 244] The Witness: I called on Mr. Langley at his office to ask him for any information that he had concerning interception of telephone conversations, the persons re-
[fol. 245] sponsible for it, and the persons to whom it may —the contents of such conversation may have been divulged with specific reference to these tapes. The only question that I asked him was whether the conversations on the tapes were of—purported to be of him were of him and whether he had given any permission to have his voice recorded or divulged. Those were the only matters that we discussed in connection with these tapes.

By Mr. Crawford:

Q. Then, there were two things. One—what was the first again?

A. One? Whether the conversations on the tape purporting to be his voice were in fact his voice.

Q. Yes?

A. And, two: Whether he had given anyone permission at any time to record his voice or publish the contents of the recording.

* * * * * * *

[fol. 247] Jack Buell, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. Mr. Buell, where do you reside, sir?

A. My residence is 7535 Southeast Tolman. T-o-l-m-a-n (spelling).

Q. Your full name is Jack—do you have a middle initial?

A. P.

Q. Jack P. Buell?

A. Yes.

Q. Where do you work, Mr. Buell?

A. At the present time, KGW-TV.

Q. Oh. We'll say during the month of May, 1946, where were you employed?

A. KPOJ.

Q. That is a radio station?

A. A radio station.

Q. What is the nature of your employment, Mr. Buell?

A. Technician.

Q. How long have you been so employed?

A. At KGW or at KPOJ?

Q. No. As a radio technician?

A. As a radio technician, here in Portland since 1944.

[fol. 248] Q. Prior to that time what experience did you have in electronics?

A. Well, I was overseas with the British as a technician also.

Q. Was that electronics technician?

A. Electronics, yes.

Q. Electronics technician. How long was that?

A. Three years.

Q. Now, in May of 1956 were you employed full time by KPOJ?

A. Yes.

Q. Were you employed by anyone else during that period of time?

A. Yes. I worked nights at KOIN-TV.

Q. KOIN-TV?

A. That was part-time work.

Q. Now, directing your attention specifically to the dates of May 21st, 22nd, and 23rd—have you been in the courtroom pretty much during this proceeding?

A. You mean now?

Q. Yes, this instant proceeding. Have you been in the courtroom hearing evidence in this matter?

A. Most of the time.

Q. Yes. Most of the time. Are you familiar with the days of the week upon which May 21st, 22nd, and 23rd, fall?

A. Yes.

[fol. 249] Q. What day was May 21st?

A. A Monday.

Q. May 22nd was on a Tuesday and May 23rd was on a Wednesday; is that correct?

A. Correct.

Q. On or about those dates did you have occasion to go to the office of the District Attorney, William M. Langley, of Multnomah County?

A. Yes.

Q. Do you know what day it was—

A. Yes.

Q. —that you went to that office? You do know?

A. Yes, sir.

Q. What day was it, Jack?

A. May 22nd.

Q. May 22nd. How do you know it was May 22nd?

A. I checked my record at KPOJ for my time. You see, there was a little overtime involved.

Q. On that day?

A. On that day. And, in my time record it shows what that overtime was for.

Q. All right. You're satisfied, are you—do you have a conviction that you are correct when you say it was May 22nd that you went to Mr. Langley's office?

A. It pretty much must have been. I don't know why it [fol. 250] shouldn't be.

Q. You did work overtime?

A. Yes, sir.

Q. How about the day immediately before that, did you work overtime on the 21st?

A. I don't believe so.

Q. You do recall going to Mr. Langley's office?

A. Yes.

Q. You believe it was on the 22nd of May?

A. Yes.

Q. All right. Now, how did you happen to go to Mr. Langley's office on that day?

A. Well, I was directed to by my superior. I don't know whether it was the general manager—it probably was. It might have been the chief engineer or it might have been the program director. But, I was told by the company to go down to Mr. Langley's office.

Q. Now, about what time of the day was that?

A. It was early afternoon and it was around 1:00 o'clock. But, I could not say for sure just exactly what time it was.

Q. It was around 1:00 o'clock?

A. As near as I can remember.

Q. All right. Now, was it before 2:00 o'clock?

A. Quite likely.

Q. Well, I want you to be as accurate as possible, Mr. [fol. 251] Buell. And, I think if you can—I will ask you again, now, was it before 2:00 o'clock?

A. I cannot be positive, but I believe it was before 2:00 o'clock.

Q. All right. Now, how long did you stay in Mr. Langley's office that day?

A. I am not really sure about that, either. But, it was quite a while. Three to four hours, I would say.

Q. All right. Now, what was your hourly shift at KPOJ?

A. 7:45 to 3:45.

Q. Is that 7:45 A.M.—

A. (Witness nods head.)

Q. —to 3:45 P.M.?

A. Correct.

Q. Do you remember how much overtime you had on that day?

A. I wish I'd taken a note of it. I did see my time slip. But, it was probably—I think it was an hour, but I am not positive.

Q. An hour?

A. I believe so.

Q. When you got up to Mr. Langley's office who was present when you got there?

A. Well, I am not absolutely sure who was present when I got there. I think Mr. Langley was, one of the girls was. I don't know whether it was his secretary or another one of [fol. 252] the girls that works in the office. And, I believe Mr. Brad Williams was there.

Q. What else did you find when you arrived there?

A. Else meaning other than the tape?

Q. No, other than persons. What else did you find?

A. Oh. Well, they had had a tape that had come—the reel had come apart and the tape was—well, it was on the floor—not necessarily on the floor, but I remember it was quite badly tangled up in itself. The reel had come apart and the tape had sprung out.

Q. Now, that tape—in regard to that tape was there a recorder in the room at that time or a player?

A. Yes.

Q. Do you know whether or not the tape was being played?

A. At that particular time it couldn't have been because it was so badly wadded up.

Q. All right. What happened to the other end of the tape? Was that on a reel, the one that wasn't tangled up?

A. Yes.

Q. Where was that reel?

A. It was on the machine.

Q. It was on the machine?

A. Yes.

Q. Did you recognize the type of machine; that is, the general type of machine?

[fol. 253] A. I probably did at the time, but I don't remember what it was.

Q. Well, no. What I meant—I didn't want you to call the brand name. I know you can't do that. But, was it a machine that was capable of playing the tape?

A. Yes.

Q. How long did you work on that tape?

A. It was between three and four hours. I don't know exactly. But, it was quite a little while.

Q. During the time that you were working on that tape—oh, by the way, first tell the Court what was the work you did on the tape.

A. I did no editing or anything such as editing. In fact, I heard very little—tiny bits of the tape; that is, just in the process of rewinding—trying to rewind it and put it—get it back into normal shape.

The tape was scrambled up like you would take a rope and it got messed up, the ends would get entangled. Well, I had to take this tape and untangle it and wind it back up on the reel.

Q. And, you say that took you from how long—took you how long?

A. It took me three to four hours. I don't believe it took any longer than four hours.

Q. In a proceeding in the District Court entitled "State [fol. 254] of Oregon Ex Rel. William L. Langley, Plaintiff, vs. Ray Clark and Sonny Martin, Defendants, Number 64256, which was a motion to suppress evidence, were you subpoenaed as a witness in that matter?

A. This was on May 23rd, is that correct?

Q. Yes?

A. Of 1956? Yes. In Judge Mears' Court.

Q. Now, when you worked on the tape what day was it in relation to the time that that subpoena was issued to you or that you were required to appear?

A. The day was the day previous to the day I was subpoenaed.

Q. That is the day, then, that you worked on the tape in Mr. Langley's office?

A. May 22nd.

Q. Did anybody come in the office during—you said Mr. Langley was there.

A. I believe he was. I know he was there at times, but whether he—

Q. Did you see him in this courtroom when he testified?

A. Yes.

Q. Did you recognize him?

A. Yes.

Q. All right. He was there?

A. At times, yes. Not all the time.

Q. Not all the time, but he was there?

[fol. 255] A. At times, yes.

Q. You say a lady was there?

A. Yes.

Q. Who else was there?

A. I cannot be sure because I didn't know. But, there was a man there and they called him Oscar. I presume that it was Oscar Howlett, but I don't know for sure.

Mr. Crawford: Mr. Howlett, will you stand up, please?

(Whereupon Mr. Howlett stood in the courtroom.)

By Mr. Crawford:

Q. Was it this gentleman (indicating)?

A. I believe so.

Mr. Crawford: Thank you.

Q. Now, by these people coming into the office was anything said by them at that time when they came in?

A. Well, there was quite a number of things said. Lots of them—I don't know what they were referring to.

Q. Was the word "court" mentioned in connection with the tapes?

A. Probably.

Q. Well, please don't testify to what probably was, Mr. Buell. Just tell the Court what you know. I don't want you to strain yourself, or anything. Just tell what you know.

A. Well, I will tell you this much—

. . . . . .

[fol. 256] By Mr. Crawford:

Q. Now, Jack, did you hear Mr. Howlett say anything in regard to the tape that you were working on?

A. I am not sure who said it.

Q. What was said?

A. I heard them say that they wanted the tapes as soon as possible. "Hurry up!" they wanted it. Now, I don't know what they were referring to, but I know they wanted the tape as soon as possible.

Q. Mr. Buell, you testified that you heard portions of the tape. You mean that was—it was a—purely inadvertent hearing on your part, wasn't it?

[fol. 257] A. Yes.

Q. Do you remember any of the contents of the tape?

A. No.

Q. It made no impression upon you?

A. (Witness shakes head.)

Mr. Crawford: You may inquire.

Cross examination.

By Mr. Luckey:

Q. You don't know what tapes these were, or anything of that kind?

A. I had an idea what tapes they were, but I didn't know for sure.

Mr. Luckey: Thank you very much.

Mr. Crawford: May I ask one question I neglected to ask?

The Court: Very well.

Direct examination (cont'd).

By Mr. Crawford:

Q. Tell the Court what type of tape—was it wire or was it what they call this plastic—

A. It was—

Q. —electronic tape?

A. —it was plastic electronic tape.

Q. How wide was it?

A. It's the normal tape that we use in broadcast work.

[fol. 258] Q. How wide is that?

A. I don't know for sure. I have used an awful lot of it, but I don't know exactly what—probably three-eighths of an inch in width. Might be less, might be more.

Q. Did you see any box—you know the appearance of the boxes that contain this type of tape? Did you see any boxes like that around there?

A. I don't remember. I might have. I don't know.

Q. But, you can state with certainty it wasn't wire?

A. It definitely was not wire.

Q. You would have been straightening it out yet?

A. Couldn't have straightened it, probably.

* * * * * * *

[fol. 260] Charles F. Moore, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name?

A. Charles F. Moore.

Q. Where do you reside, Mr. Moore?
A. 1736 Third Street; Milwaukie, Oregon.
Q. What is your occupation, sir?
A. I am a radio technician.
Q. By whom are you employed?
A. Radio Station KPOJ.
Q. How long have you been employed there?
A. Little over a year.
Q. Do you know the date you first went to work for them?
A. January 18, 19—
Q. 19—
A. —56.
Q. Prior to that time where were you employed?
A. Radio Station KWJJ.
Q. In Portland, Oregon?
A. Uh huh.
Q. In what capacity?
A. As a technician.
[fol. 261] Q. What is your experience as a technician?
A. In the broadcasting industry, about 11 years.
Q. And any other experience?
A. Previously I was an Army radio technician and I worked as a repair technician and construction technician before that. It dates back to the '30's.
Q. At the present time do you at KLOR occupy a certain position?
A. At KPOJ.
Q. What is your position again?
A. Technician.
Q. Just technician?
A. Well, no. I do announcing too, some of it.
Q. Mr. Moore, were you in the Multnomah County Courthouse on May 18, 1956?
A. Yes, I was.
Q. Do you know what day of the week that was?
A. That would be Thursday—or, a Friday. Excuse me.
Q. May 18th, Friday?
A. Uh huh.
Q. Now, what time on that day were you in the courthouse?

A. Well, I arrived there approximately at 2:00 o'clock in the morning.

Q. About 2:00 o'clock in the morning. Did you take any equipment with you? Oh, wait a minute! Did you go with [fol. 262] someone else? Who did you go with?

A. I went with the—I believe he is the night editor of the Oregon Journal. At least, he accompanied me. His name is Bob Stein.

Q. Bob Stein?

A. Yes.

Q. Do you know how to spell it?

A. S-t-e-i-n (spelling).

Q. Did you go on your own to that—what place in the courthouse did you go?

A. To the then—to the County Sheriff—the Multnomah County Sheriff's office.

Q. Terry Schrunk's office?

A. Yes.

Q. On what floor of the courthouse is that located?

A. Well, it's on the main floor.

Q. It's on the 4th Street side?

A. No; on the 3rd Street side.

Q. Well, you mean on the east side?

A. The east side of the building. Oh. The 4th Street, yes. Excuse me. 4th Street, yeah.

Q. Now, when you arrived there who was present?

A. Well, when I first arrived there I didn't—we didn't go into the office because the Sheriff wasn't there yet.

Q. Well, you and Mr. Stein, I presume, went together? [fol. 263] A. Went together, yes.

Q. All right. Now, when you first went in the courthouse where did you go?

A. Well, in the lobby or vestibule, and we met two Journal reporters.

Q. What were their names?

A. Brad Williams and, I believe, it is Doug Baker, the other fellow.

Q. That was on the main floor of the courthouse?

A. Yes.

Q. In the vestibule?

A. Uh huh.

Q. How long did you wait there?

A. I am not—I can't tell you exactly, but I believe about a half an hour.

Q. All right. Now, did you take any electronic equipment with you?

A. Yes, I did.

Q. What was it that you took?

A. I took two tape-recording machines.

Q. Two tape-recording machines?

A. And several reels of blank recording tape.

Q. And several reels of blank recording tape?

A. Yes.

Q. All right. Now, you say you waited for about half an hour. What happened after the half-hour wait?

[fol. 264] A. Well, then, Sheriff Schrunk arrived and we went into his office.

Q. On the first floor?

A. On the first floor.

Q. Did anyone else arrive?

A. Well, I believe later Deputy Sheriff Minielly arrived.

Q. Do you know about what time that was?

A. No, I don't.

Q. You say you arrived there about 2:00 o'clock, you waited a half hour. Can you give me any accurate estimate after that period of time when Mr. Minielly arrived?

A. No, I can't.

Q. But, it was some time after?

A. It was some time after it, yes.

Q. All right. What did you do with this equipment you had?

A. Well, I set it up with the preparation to make duplicate recordings of some of these tapes that they had in Schrunk's office.

Q. Yes. Had you ever seen those tapes before?

A. No.

Q. Had you ever heard their contents—

A. No.

Q. —prior to that time? Now, who told you to go there?

A. Well, I was told by the Manage—I worked the late shift until 1:30 in the morning. And I was told by the

[fol. 265] Manager of Radio Station KPOJ. He called me on the telephone.

Q. What is his name?

A. His name is Dick Brown.

Q. What time was that that you were called?

A. Well, that was some time—I can't place it exactly. Between 11:30 of the night of May the 17th and 12:30 A.M. of the 18th.

Q. 12:30 on the 18th?

A. (Witness nods head.)

Q. That is, in between that time?

A. Yes. I mean that one-hour time in there.

Q. Where were you when you received that call?

A. I was at the transmitter location which is on top of Mt. Scott.

Q. I didn't get that.

A. I say, I was at the transmitter location which is on the top of Mt. Scott on the east side of Portland.

Q. Who set up this equipment in Mr. Schrunk's office?

A. I did.

Q. Now, I presume you had two recorders; is that correct?

A. That is correct. Yes.

Q. Now, why the two recorders?

A. Well, in order to make duplicates you have to have one to play the recording from and, then, one to record the duplicate on.

[fol. 266] Q. I see. You take that, let us call it, the original reel and you put that on one machine and you turn it on to play, is that it?

A. That is correct. Yes.

Q. Is that the correct word? Is it "play" or "transmit"?

A. Play is all right.

Q. Play. Then, whatever is on that tape plays like a phonograph into the other tape; is that the correct procedure?

A. Yes; with a suitable patch between the two cable wires.

Q. What do you call it?

A. Well, a suitable patch or wire between the two machines. And, then, you can record from one to the other.

Q. Record from one to the other?

A. To the other.

Q. Now, what procedure was filed in this instance?

A. What do you mean by "procedure"?

Q. Well, how was the copying of the tapes done?

A. Electronically. How do you mean?

Q. Well, I want to know the manual operation that you went through in recording.

A. Well, I would place the reel of tape to be duplicated on the one machine and put the machine on Play position and place the other machine on Record position with this wire in between, a suitable patch, as we call it, and then turned both machines on, one—the one to record on Record [fol. 267] and the other on Play and that would reproduce a duplicate of the original.

Q. Now, let's take the machine that you placed on Play. In the process of making a duplicate, when the recording machine is in operation; that is, the one we will call that, the Play machine—

A. All right.

Q. —are the sounds on the tapes—or, were the sounds on the tape audible? That is, could persons in the room hear them?

A. Well, on this particular machine that I had, yes.

Q. They could? And, they did?

A. Yes.

Q. Now, the person that was—was Bob Stein there at the time this machine was playing?

A. Well, wait a minute. We may have made this audible by using headphones. I have forgotten at the moment. I had the machines reversed in my mind. One of them you could do that. That was the one I was recording on.

Q. Who had a headphone on?

A. I think I had a set of headphones on this one machine that I could hear the tape on.

Q. And who had the headphone?

A. Well, I did. Had them on the table.

Q. You laid the headphone on the table?

[fol. 268] A. Yes; I think so.

Q. Then, could the other people—did the other people in the room listen to that headphone?

A. Well, the portions for me to record were selected by playing it on the playback machine first and listening on the loudspeaker to it.

. . . . . .

Q. In other words, then, you made this tape or tapes on a loudspeaker and then from that, after listening to the tape on the loudspeaker, some person directed you to record particular selections from the tape?

A. Yes; particular segments.

Q. Yes. Who was the person that directed you to so record particular segments?

A. Well, there were three Journal reporters there, which I mentioned before in the testimony. I was at times directed by various ones. I couldn't say just which ones in particular.

Q. Did they all direct you?

A. Well, I think mainly Williams—Brad Williams—or, Brad—that was his name, wasn't it?

Q. Brad Williams.

A. Yes. And, Doug Baker.

[fol. 269] Q. The third man from the Journal was Bob Stein?

A. Bob Stein, yes.

Q. Was he present during all that time?

A. Yes. I think he was there all that time.

Q. Was Mr. Williams there during all that time?

A. Well, I can't be sure. I couldn't say for sure.

Q. How about Mr. Baker?

A. I couldn't say for sure on that. In fact, I don't believe I could say for sure about all of them. But, some of them were there all the evening that I was there all during the morning hours.

Q. You mentioned Bob Stein as being a night editor. Then you later spoke of him as a reporter. Did you mean Mr. Stein, a reporter?

A. Well, I understand—I am not sure, but I believe his title is Night Editor of the Journal. That's what I was given to understand.

Q. Well, then, Brad Williams and Doug Baker are two reporters?

A. Are reporters, yes.

Q. Was there a third reporter?

A. No; just the three altogether.

Q. I see.

A. The three from the Journal.

Q. Now, you said Mr. Schrunk was present and Mr. Minielly?

A. Yes.

[fol. 270] Q. And, who else?

A. Well, there may have been another man, but I am not sure about it.

Q. Do you know what his name was?

A I am not even sure that there was another man. I say, there may have been one.

Q. Were people coming in and out of the office?

A. No. How do you mean? You mean—

Q. Was there a traffic in and out of the office?

A. Oh, no. No. It was in the early hours of the morning.

Q. Now, how many copies did you make?

A. I believe that I recorded two reels of tape. I am not certain about it.

Q. But, what did you do with those reels of tape?

A. Well, one of the Journal reporters took them.

Q. Which one?

A. I am not certain about that.

Q. Now, was there any other radio technician present at that session?

A. No.

Q. So, all the persons present, then, were yourself, Bob Stein, Brad Williams, Doug Baker of the Journal; Terry Schrunk and George Minielly?

A. I believe—yes. There possibly could have been another person there, I am not sure of it.

[fol. 271] Q. Now, did you ever at any other time make recordings of that same tape?

A. No, I did not.

Q. By the way, how many reels of tape were there that you made copies from?

A. I can't be sure of that. There was tape on the table in the Mayor's office. I think there were, perhaps, four or five reels and, perhaps, more. I can't be sure.

Q. When you say the Mayor, do you mean Terry—
A. I mean the Sheriff, yes.
Q. Terry Schrunk who was the Sheriff at that time?
A. Yes.

* * * * * * *

[fol. 274] Ronald E. Sherk, previously produced as a witness in behalf of the defendants, having been previously sworn by the Clerk, was examined, and testified as follows:

Direct examination (con't).

* * * * * * *

Mr. Crawford: Counsel will stipulate, Your Honor, that the printed date—as a matter of fact it is the only printed date on the card—that that date is September 5, 1956.

The Court: Very well.

Mr. Crawford: In this Photostat it is rather blotted.

Mr. Luckey: So stipulated, Your Honor. It appears to be a rubber-stamped date.

The Court: I understand.

By Mr. Crawford:

Q. Mr. Sherk, I believe your testimony was that you went to the box 912 in the First State Bank of Milwaukie on August 13, 1956?

A. Yes. I said to the best of my knowledge that it was on or about August 13, 1956.

Q. Do you recall what time of day?

A. No. I don't recall the time of day.

[fol. 275] Mr. Crawford: Mr. Price, would you hand this Exhibit 11 and 11-A to the witness?

(Whereupon the Crier does as requested.)

By Mr. Crawford:

Q. I direct your attention, Mr. Sherk, to the date which appears before the date which is rubber-stamped and which has been stipulated to between counsel as September 5, 1956. What date appears there?

A. 8-13-56.

Q. I mean, what time of day?

A. 3:43 P.M.

Q. Now, does that refresh your memory?

A. I imagine that that is correct. It doesn't conflict in any way with my recollection of the matter. And it is the only entry shown on here for August 13th or any time around August 13th. So, it is my belief that that refers to this visit that I spoke of.

Q. Who was present?

A. Captain Gurdane of the Oregon State Police and Lieutenant Cross.

Q. Clyde Cross?

A. Yes, sir.

Q. Or, Claude Cross?

A. Claude Cross.

Q. Claude Cross. Who signed as entering the box?

A. Claude Cross.

[fol. 276] Q. Did you three men; that is, Gurdane, Cross, and yourself enter the State Bank of Milwaukie at the State Bank as a group together? Did you all go in together?

A. That's my recollection.

Q. Did you go down to the actual safety deposit vault?

A. Yes. The deposit vault there is located on the same floor as the main banking lobby and is just a few feet off that lobby toward the east end of the bank.

Q. Is it in a separate—a room, separate and apart from the space in which general banking is conducted?

A. The vault itself where the safety deposit boxes are is a separate room or vault.

Q. The entrance to that room, is it by means of a door like we come into this courtroom or is it a steel door, or what type of door?

A. The way I remember it there is a counter around that part of the bank where there are some desks and then there is a door similar to an ordinary door into an outer room and then there is a vault door going into where the boxes are. And customers go in there and take the boxes out and come out and they—this examination room is this little outer room.

Q. The door to the room in which the safety deposit boxes are located, is that a steel-grating-type door; that is, with bars?

A. Well, there may be a steel grating. I think there is [fol. 277] also a regular large vault-type door that they close at night.

Q. Like a walk-in safe?

A. Like a walk-in safe.

Q. Now, who went into the room containing the safety deposit boxes?

A. As I recall, all three of us.

Q. All three of you. Who on behalf of the bank used the bank's key?

A. I am not sure. It could have been Mr. Franz.

Q. Now, there was a representative of the bank present?

A. Oh, yes.

Q. At the time that the safety deposit box was opened, is that true?

A. Yes.

Q. Mr. Cross had the key?

A. I believe so.

Q. Mr. Franz had a key or, at least, a representative of the bank had a key?

A. Yes, sir.

Q. Now, did you watch the box being opened?

A. Yes, sir.

Q. Did Mr. Gurdane insert one key and Mr. Cross insert another key and thus open the box?

A. It's my recollection that one of the State officers, either Mr. Gurdane or Mr. Cross, inserted their key and that the representative of the bank inserted the bank's key. [fol. 278] Q. You heard the testimony of Mr. Franz the other day in regard to the manner in which the safety deposit boxes are opened?

A. Yes, sir.

Q. And, his testimony, I believe, was briefly that in order to open this box it takes a key that is always in the possession of the bank and a key that is in the possession of a rentor or a signatory of the box, both of those keys which are different, to open up the box. You so understand?

A. That is my understanding.

Q. That does not conflict from what you saw on this occasion?

A. No, sir.

Q. Now, how big a box was box number 912?

A. Well, I don't have as exact a recollection of it as Mr. Franz, but pretty good big-sized box, about, oh (witness demonstrates) half the size of an apple box.

Q. It's my recollection that it was about 12 inches wide, 9 inches high, and about 3 feet deep. Is that about right, Mr.—

A. Yes. That's about right.

Q. Now, Mr. Sherk, you stated you were present at the actual opening of this box on that date?

A. Yes, sir.

Q. Now, that box was recessed in the wall, was it not?

A. Yes, sir.

Q. And, the box in which this evidence was contained was [fol. 279] enclosed in a tin or steel box, sheet-metal box of some kind, was it not?

A. The box itself is metal.

Q. Yes. And, that has a cover on it?

A. Yes.

Q. Now, as you stood outside of the vault and before the keys were inserted and the door opened and the box removed, could you state of your own knowledge what that box contained?

A. No.

Q. That was true on August 13, 1956, was it not?

A. Yes.

Q. Now, did you see the tape or any of the evidence which you obtained in the search warrant between August 13, 1956, and September 5, 1956?

A. No, sir.

Q. On August 13th, Mr. Sherk, did you play the tapes?

A. No, sir.

Q. How many tapes did you see on August 13, '56?

A. Five.

Q. What was their physical condition? Were they rolled up on a reel or were they strung out?

A. Each one of the five tapes was in an individual box. The tapes are a disk about that big around (witness demonstrates) about 7 inches in diameter. Each one of the tapes [fol. 280] was in an individual flat box.

Q. Now, do you remember the color of those boxes?

A. No. No, not to testify under oath.

Q. You are not color-blind? I mean that.

A. No.

Q. You don't—I mean that seriously. You don't have any—

A. I can give you an impression as to what color they were but as to say exactly what color they were and what—how many boxes there were of one color and how many of another, I couldn't tell you.

Q. Well, I wanted to know if you knew of your own knowledge at this time or if you knew if you have an absolute recollection?

A. No, I have no absolute recollection.

Q. Did you make any notes that would give you a recollection?

A. No. I made no notes at that time.

Q. Now, did you open up the boxes?

A. Oh, yes.

Q. All of them?

A. All of them.

Q. You did not play the tapes?

A. No, sir.

Q. When was the last time you had seen those tapes if you had seen them before?

[fol. 281] A. I hadn't seen them since the time up in the Sheriff's office on May 22, 1956.

Q. Did you know of your own knowledge on August 13, '56, that the tapes that you saw in box 912 in the Milwaukie State Bank were the same tapes that you saw in the Sheriff's office on May 22, 1956?

A. I was convinced that they were but they had not been in my possession during all that time and that is the only way I could have known positively.

Q. Well, is it possible to have a tape on a reel and to hold it in your hand and look at it and say of your own

knowledge that that is a certain particular tape from the tape itself?

A. Well, in this case—

Q. No. Just answer that question first and then we will go on.

A. Well, I suppose it would be possible to mark it in some way so that you could identify it. But I didn't do that in this case.

Q. The tape or the—

A. The tape.

Q. —reel?

A. No.

Q. Did you mark the reels?

A. No.

[fol. 282] Q. You didn't mark the tape?

A. No.

Q. Again, speaking of your own knowledge, Mr. Sherk, the five reels of tape that you saw in the First State Bank of Milwaukie on the 13th of August, 1956, could, well—there was a possibility that those were blank tapes, wasn't there?

Mr. Luckey: If the Court please, I again would question the direction in which counsel is leading because if it is counsel's contention that these were not the tapes that were seized from the house of the defendant I can see that he would have no interest whatsoever in the search and seizure that was made at the bank and for that reason I suggest that what was on the tapes has no relevancy to the search and seizure of this matter.

Mr. Crawford: Just a minute, Your Honor. This witness has made an affidavit in support of a search warrant in this case. Now, this is what he says:—

The Court: Well, I think I understand your position. You take the position—

Mr. Crawford: This is a very unusual case. I could say this, Your Honor: He could—if this was a bottle of whiskey that we were after he could have smelled it and he could have stated that that was whiskey—

Mr. Luckey: Well—

[fol. 283] Mr. Crawford: —or it was—pardon me.

Mr. Luckey: Excuse me, Mr. Crawford.

Mr. Crawford: Or if it was a letter that they could have handed to him and he could have read it and looked at it, he could tell—or, some other object capable of identification. But, we don't have that here.

We have a very peculiar circumstance. We have an object where there is a distinct possibility that this person would have no personal knowledge about. Now, I have a right to inquire into what his personal knowledge was, whether or not that was accurate, whether there was a possibility of his being mistaken, or whether there was a possibility of his not being able to state within his own personal knowledge that those were the tapes; particularly, tapes that had upon them an intercepted—an intercepted conversation in violation of Section 605. You see?

The Court: I think I understand your position. Of course, you—

Mr. Crawford: I am going directly at the search warrant here.

The Court: —you urged that the tapes in the custody of the Court taken under the search warrant are your tapes. You have to take that position or you would have no standing in court.

Mr. Crawford: Well, I can say this, Your Honor, so [fol. 284] we will clear up that point: There is plenty of evidence, and there will be more evidence, that any tapes that were seized were to this extent—at least, the evidence shows at this time, and we are not through with our case yet—were taken from the actual dwelling house and abode of Ray Clark where he lived—

The Court: Yes.

Mr. Crawford: —where he slept, where he had, to the exclusion of all of the world except, perhaps, someone who would come in and claim something—but, certainly as against anybody that is concerned in this proceeding he had a superior right to possession. When the time comes to argue that question of law I think I can convince Your Honor on that point that there is a case by the United States Supreme Court, the McDowell case, where it seems to me they went awful far in demanding the degree of

proof that should be required as to the proprietary interest. You know—

The Court: Yes.

Mr. Crawford: —you know, Your Honor, from your experience in the former criminal cases that the true owner of a piece of property still may be divested of the possession of it.

The Court: Surely.

Mr. Crawford: So, it would constitute larceny in person.

The Court: Perhaps when I said there "your tapes," I [fol. 285] went further than I needed to do. You take the theory that you have the right of possession of them or, otherwise, you wouldn't have any standing in court. So, with that premise I can now attack the problem as to ascertaining what knowledge this witness as the subscribing deponent to the affidavit—that he had reason to believe that they were the same tapes that he had seen before.

Mr. Crawford: Your Honor, will you please bear my contention in mind—

The Court: Yes.

Mr. Crawford: —that a search warrant—that is, an affidavit, the basis of a search warrant, must be made upon the personal knowledge of the affiant?

The Court: Yes.

Mr. Crawford: It cannot be made upon information and belief, and it cannot be made upon mere conclusion. So, it is always pertinent in the examination of an affiant in a question of this kind to test the personal knowledge of the affiant concerning the facts which he had in his possession at the time that he made the search warrant.

The Court: Yes.

Mr. Crawford: You see? Now, that's the only purpose in that.

The Court: I agree with you. I have been trying to state that.

Mr. Crawford: Very well. If you agree with me I will [fol. 286] sit down.

Mr. Luckey: If Your Honor please, the original search warrant—I mean, this search warrant was for the bank. It was not directed at these defendants. Now, certainly if they're to have any standing they must come in and assert

that these were the tapes that were taken from them.

The Court: Right. That's what he conceded that he has to assert a proprietary interest in them.

Mr. Luckey: That's right.

The Court: And, I take it that he is not claiming that the tapes that were taken were not tapes in which he had a proprietary interest. He is merely inquiring as to whether or not on August 13th this witness saw these same tapes and, if so, how he knows.

Mr. Luckey: Well, to that extent, perhaps. But, I fail to see the connection between our search of these tapes which must be connected up later and the motion to suppress them as evidence now. If counsel takes the position that they are not the same tapes—

The Court: He can't. He concedes that.

Mr. Crawford: Your Honor, I am not forced to concede that. Counsel is not—is not at this time—

The Court: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?

[fol. 287] Mr. Crawford: That's right.

The Court: Taken under the State's warrant. You don't repudiate that, do you?

Mr. Crawford: No.

The Court: Yes.

Mr. Crawford: I am merely going to the objection of this question. As I said before, I am merely testing this witness' knowledge. Maybe counsel and I don't understand each other. But, that's my purpose.

The Court: Yes, I think we all concede. He may answer the question.

Mr. Luckey: There is a serious question, Your Honor, of the defendants having any standing to object to seizure from a third party, in any event. The Remmer case in the Ninth Circuit, Your Honor—

The Court: Yes. I understand your position about it, Mr. Luckey. But, even assuming for the sake of argument that these were illegally seized, which we have, during the whole proceedings assumed—more or less assumed that, the Government's position is it isn't concerned whether or not there was an illegal search or whether the search was

legal. In any event, so far as these proceedings are concerned, they were not taken from the possession of either of these defendants or any person now in court claiming a return of the same, if I understand the Government's theory about it.

[fol. 288] But, there again our test is to determine whether or not the Federal Government and its agents played any part in the initial search. That's been the whole theory of the defendants in this case and from their assertions they say they will connect that up.

In connection with that original search, if that was illegal and the Government was a party to it they cannot now come in and take it under an illegal search warrant.

Mr. Crawford: Well, just a minute. I think I stated the four theories upon which we were proceeding.

The Court: Yes.

Mr. Crawford: I hope the Court isn't merely holding me to just one of them. I am proceeding on all four of the theories which I stated immediately upon taking up in this afternoon session.

The Court: Well, I can't see where there is anything in the remarks of the Court that is inconsistent with any one of your four theories.

Mr. Crawford: Thank you, Your Honor.

Mr. Luckey: Well, of course, the first one, Your Honor, if there was an illegal cooperation it certainly is difficult to see how an entry in a deposit box on August 13th would be related to a seizure on May 17th.

The Court: That would only be in the event you acquired them legally at some subsequent date under your own warrant.

[fol. 289] Now, may we have the question that was presented so we will be oriented?

(At this point the last question to the witness was read by the Court Reporter.)

The Court: I think, aside from the question we have been debating, this witness testified on his direct examination that he saw these tapes on August 3rd and he certainly may inquire as to what the factual situation would be.

Mr. Crawford: August 13th.

The Court: I said 3rd. I stand corrected. August 13th.

(At this point the question read by the Court Reporter in the last parenthetical was again read.)

The Court: What authority do you have that we are dealing with possibilities as distinguished from probabilities?

Mr. Crawford: Well, Your Honor, as I started to say a while ago, we are not dealing—the object of this search, that is, the evidence itself—it is a very peculiar type of evidence—it is—they're speaking of the nature of the tapes, it is—they are—you can look at them but you can't tell what is on them. You can't tell what they contain no more than you could look at a phonograph record and by merely looking at that record state what that record contained, whether it contained a conversation, a book or [fol. 290] history, or music—

The Court: Well—

Mr. Crawford: —until you played it.

The Court: I understand there are technicians who can read a record and tell you exactly what is on it.

Mr. Crawford: Well, I will ask that.

The Court: You ask that question instead of saying is there a possibility.

Mr. Crawford: I am going to ask.

Q. By merely looking at a piece of electronic tape, and speaking of these five particular tapes now, by merely looking at the tape itself could you tell what conversations were on that tape, if any?

A. I am not an electronic expert but I feel sure that this answer is correct that No you could not tell.

Q. That's what I thought.

A. This particular type of tape, the sound markings on there leave no mark.

Q. They leave no mark?

A. No visible.

Q. No visible mark. Have I got you outside that safety deposit box yet? Did I ask you about that?

A. Well, we sort of jumped around there.

Q. All right.

A. You got me up to the point where we opened the box up.

[fol. 291] Q. All right. You opened the box, Mr. Gurdane, or Mr. Cross, whoever it was, inserted a key and the bank representative inserted another key and the door was opened?

A. The drawer.

Q. Drawer. Or, the door was opened—is it a drawer or a door?

A. Well, I believe there is a door and a drawer. After the door is opened the box with the drawer slides out.

Q. The box comes out. Who took the box?

A. I can't be sure; we were all there together.

Q. Where did you go with it?

A. As I recall, we took it out to this little examination room outside that is provided for customers to look over the material in the box—in their safety deposit boxes.

Q. What did you do then?

A. Well, I looked at all the items in the box.

Q. And what did they appear to be?

A. Well, there was a Minifon-brand tape—small wire-recording machine and three spools of wire tape for that machine, the case in which the machine was fitted, and five reels of electronic tape.

Q. Five?

A. Five.

Q. Not six?

A. No. Five.

[fol. 292] Q. Was that the entire contents of the box?

A. Yes, sir.

Q. Was there any other article of any kind or nature in that box?

A. No, sir; not to my recollection.

Q. Then, there was a Minifon, five rolls of electronic tape; that is, the plastic type, and three spools of wire which is used for recording?

A. Yes.

Q. Was there a brand on the outside of the wire spools?

A. If there was I didn't notice it. It was—it was right together with the Minifon recorder and is the type of wire that is used on the Minifon.

Q. But, you didn't notice any brand name on them?
A. I don't believe I—if I did I don't remember it now.
Q. Was there a serial number on the Minifon?
A. Yes, but I didn't make note of it.
Q. On August the 13th—
A. No, sir.
Q. —you didn't see a Minifon—oh, by the way, that must have been the first time you ever saw a Minifon?
A. No.
Q. The Minifon that you actually seized, is that correct?
A. Well, I saw a Minifon that I believed to be the Minifon that I actually seized when I called up the Sheriff's office [fol. 293] on May 22, 1956, and I so testified here previously this afternoon.
Q. Have you mentioned that before?
A. Yes, sir.
Q. But, you only found three spools of Minifon wire, we call it?
A. Yes.
Q. Did you ever see four?
A. Well, now, I know what you are getting at because it says, in the affidavit for the search warrant that you handed me "four spools" and I am unable to explain that discrepancy. Three is all I remember.
Q. Around about 2:30 I believe you testified—2:30 on September 5, 1956, you made the affidavit in support of the search warrant, 2:00 or 2:30 in the afternoon?
A. I believe that's about correct.
Q. Now, search your memory. Can you think of any reason why you said four spools of Minifon-recording-machine wire instead of three at that time?
A. I have already answered that question. I am unable to explain that discrepancy.
Q. From your independent recollection how many spools of Minifon wire did you see in the Sheriff's office on May 22, 1956?
A. Three.
[fol. 294] Q. How many spools of Minifon recording wire did you find in the safety deposit box when it was opened pursuant to the search warrant on September 5, 1956?
A. Three.

Q. As far as you know you have never seen four—
A. As far as I know.
Q. —spools in connection with this?
A. As far as I know.
Q. Now, in between August 13, 1956, and September 5, 1956, did you see any of the articles that were seized under the search warrant on September 5, 1956?
A. No.
Q. You didn't visit the First State Bank of Milwaukie during that time?
A. No.
Q. Did you on September 5th prior to the execution of the search warrant visit the First Bank of Milwaukie?
A. No.
Q. Never at any time from August 13, 1956, until the box was opened pursuant to the search warrant did you see the articles that you seized under the search warrant?
A. No.
Q. All right. Let's go to September 5th now 1956 at the time of the execution of the search warrant. Now, when the search warrant was executed who did you enter the bank with?
[fol. 295] A. Another special agent of the F.B.I. and Captain Gurdane of the Oregon State Police.
Q. Was that Mr. Dunn who was with you?
A. Yes. That was Mr. J. Eldon Dunn.
Q. Eldon Dunn.
Mr. Price, please give me the last exhibit. That is the admittance record.

(Whereupon the Crier hands the document to Mr. Crawford.)

By Mr. Crawford:

Q. Were either you or Mr. Dunn required to sign the admittance slip being Defendants' Exhibit 11-A at the time of the execution of the search warrant?
A. I don't recall. There is a notation on there that looks—

Mr. Crawford: Mr. Price, hand that to the witness, please.

(Whereupon the Crier hands the document to the witness as requested.)

By Mr. Crawford:

Q. I direct your attention to the notation on September 5, 1956, that being the stamped date. Do you know who wrote that on there?

A. No, I don't know who wrote it on there. But, I can tell you what it appears to be.

Q. It appears to be J. E. Eldon, doesn't it, search warrant?

A. Yes. That's what it looks like. It looks like J. Eldon. search warrant, J. Eldon, F.B.I.

[fol. 296] Q. Well, all right. But, you did give your receipt to the bank manager, Mr. Franz, as was typed on the back of his copy of the search warrant?

A. Yes, sir.

Q. Yes. Now, you and Mr. Dunn went in the bank?

A. Yes.

Q. Where was Mr. Gurdane?

A. He was with us.

Q. Did you proceed into the safety deposit vault?

A. I went first to Mr. Franz, the manager of the bank.

Q. And you served upon him, I presume, the search warrant?

A. Yes, sir.

Q. Then, did all three of you go into the safety deposit vault?

A. Yes, sir; all four of us. That is, Mr.—

Q. Dunn, yourself, Gurdane, and Mr. Franz?

A. Yes, sir.

Q. Now, who had the bank's key?

A. Mr. Franz.

Q. Who had the key belonging to the Oregon State Police?

A. Captain Gurdane.

. . . . . .

[fol. 297] By Mr. Crawford:

Q. In other words, the box was opened up by a key of Mr. Gurdane and Mr. Franz, is that it?

A. That is correct.

Q. Now, Mr. Sherk, just before you opened the box did you know of your own knowledge—now, not through what some other person told you—but, did you know of your own knowledge that the articles which you found there were in the box immediately before you opened it at that time?

A. In the sense in which you have phrased the question, no.

Q. Yes. And, that's equally true that you did not know of your own knowledge that the articles which you subsequently seized under the warrant were in the box at the [fol. 298] time that you made your affidavit; that is, of your own knowledge?

A. In the sense in which you have phrased that question no affiant appearing before a United States Commissioner in the Courthouse here could know of their own knowledge that anything was located at a point distant from there.

Q. Well—

A. So, the answer is No.

Q. The answer is No, isn't it?

A. Yes.

Q. You are taking into consideration the fact that the last time that you had seen these articles was on August the 13th immediately before September 5, 1956, isn't that correct?

A. Yes.

. . . . . .

[fol. 305] Q. You secured five tapes as a result of your search warrant; that is, the search made under the search warrant on September 5, 1955? Five tapes?

A. Yes. There were five reels of electronic recording tape included in the items that I seized under the search warrant on September 5, 1956.

Q. Yes. Do you know now that the reel of tape that you played or the portion of that reel of tape that you played in the Sheriff's office on May 22, 1956, was amongst the five tapes that you received or that you secured from the

safety deposit box as a result of his search of September 5, 1956?

A. That is my firm belief after listening to the tapes.

Q. You recognized that one, at least?

A. Yes.

Q. The same question in regard to the spools of wire that you recovered in the search?

A. You will recall, Mr. Crawford, that I did not listen to the wire prior to September 5, 1956.

[fol. 306] Q. At the time you made your affidavit in support of the search warrant, Mr. Sherk, did you know of your own knowledge with the exception of Mr. Langley whether or not the individuals whose conversations are purported to be upon the tapes had ever consented to their conversations being intercepted?

A. Now, will you define of my own knowledge?

Q. Well, you talked with Mr. Langley, didn't you?

A. Yes.

Q. All right. Let's leave Mr. Langley out, then. Let's take all the rest of the individuals whose names you mentioned. I believe that was Maloney, McLaughlin, Gamrath, Sheridan, Maloney's son, and McLaughlin's son. I believe you testified that you did not talk with those people until after the search warrant was executed, is that correct?

A. That is correct. I personally did not talk to any of those individuals until after that date.

Q. After that date.

Now, then, you, of your own knowledge do not know whether any of those individuals whose names I mentioned, leaving out Mr. Langley, had ever consented that their conversations be intercepted?

A. I must ask you to define of my own knowledge.

Q. Well, of your own knowledge means facts, not what someone else told you. But it means first-hand knowledge. [fol. 307] I mean to exclude what other third persons told you other than the person themselves.

A. Very well. I can answer your question then in this way: I can again state that I had no conversations either orally or in writing or in any other manner with those

persons that you named with the exception of Mr. Langley prior to September 5, 1956.

Q. That statement continues on until after the period of time on September 5, 1956, when you executed the search warrant?

A. It does.

Q. It was after that—all of the day of September 5, 1956?

A. Yes, sir.

Q. Yes. Now, Mr. Sherk, what did you know of your own knowledge that the conversations purported to be on these tapes were designed or intended for the use or benefit of a person or persons not entitled thereto? What did you know of your own knowledge in that respect?

A. Of my own knowledge I knew what I had heard on the one tape that I listened to. And the very nature of the tape itself which I presume will be introduced in evidence at a later time in this trial was such that I arrived at the inescapable conclusion that that was the case.

Q. But, you had never heard any telephone conversations on any of the tapes except a small portion on one of the [fol. 308] tapes at the time?

A. About a half hour.

Q. At the time until after you had executed this search warrant, isn't that correct?

A. I had heard about a half hour of various conversations on that part of that one tape.

Q. Of that one tape?

A. (Witness nods head.)

Q. But you had not heard any conversations at all on the other tapes?

A. No, sir.

Q. Now, to go back to this one tape that you heard, Mr. Sherk, by an inspection of the tape and by hearing it played for this half hour—

A. Approximately 30 minutes, yes, sir.

Q. Yes. Did you know of your own knowledge whether or not—did you know the manner of interception of the telephone conversations?

A. Would you be more specific with that question? I am not sure that I understand it.

Q. I asked you if you were able from listening to a portion of one of the tapes for a period of 30 minutes to know of your own knowledge the manner of interception of the messages?

A. The thing that I don't understand about your question is what you mean by "the manner." You mean was it [fol. 309] done electronically or by a phonograph, do you mean who did it, do you mean where it was done? What sort of thing do you mean by that?

Q. No. I mean, you have averred here positively and as a fact that these recordings contained intercepted telephone conversations. Now, from a reading of the tape or from a listening of the tape for approximately 30 minutes what did you know of your own knowledge as to the manner of the interception?

A. I just don't understand what you mean by "the manner." Would you define that, sir?

Q. Well, I do not attempt to give you any loaded question or any tricky questions, or anything of that nature. I am simply inquiring this: Tapes or conversations off of telephones in order to be intercepted must be intercepted in some manner, must they not? Is that correct?

A. I think I understand.

Q. Yes.

A. It was my firm belief from listening to the tapes that the conversation had been intercepted electronically.

Q. All right. Now, was this possible and I don't mean remotely possible—I mean, was there a good possibility from all you could determine from your hearing of the tapes during that half hour, was this possible that a device could be placed on the part of the telephone by which you hear out of and speak into and by that manner intercept- [fol. 310] ing the telephone conversations?

A. Now, that is a matter of opinion.

Q. Well, could it be done? You couldn't say it couldn't, you couldn't say it could?

A. Yes, I can answer that question. It is my belief that it could be done in that manner.

Q. Yes.

A. I would like to further qualify that answer, if I may.

Q. Go ahead.

A. It is not my belief that that is the way that at least part of the conversations on those tapes was done for the reason that there was little, if any, background noise in part of the conversations whereas there was considerable background or room noise in other parts of the conversations.

In my opinion they were recorded directly off the wire, but I am not an expert in the matter.

Q. All right. Were you able to ascertain that in respect to all of the tapes from the mere listening to a portion of one of the tapes at the time you listened to it?

A. Let me see if I understand your question. Did I know what was on the other four tapes from listening to the fifth tape?

Q. Yes.

A. No.

Q. As a matter of fact, you didn't know anything at all [fol. 311] about them, did you, the other four tapes?

A. I had heard what was on them from other people. But, as far as listening to them is concerned, no.

Q. Right here—no. I mean, what you knew of your own knowledge, Mr. Sherk. And I don't mean what you read in the newspapers either. Exclude that, please. But, from your own knowledge you had no real personal knowledge of the manner of interception, isn't that correct?

A. Well, that is two questions.

Q. Well, leave off "isn't that correct".

A. Well, I mean you were talking about whether I knew what was on the other tapes and then you threw one in about the manner of interception. I have a very definite and official belief as to the manner of interception.

Q. Well, please, my questions, of course, assume the time element here as of the time you made the affidavit, you see?

A. As of the time I made the affidavit I had a very firm and definite belief as to the manner of interception of the portion of the tape to which I had listened.

Q. How about the other four tapes?

A. I had every reason to believe that they contained similar conversations.

Q. But, did you have any real personal knowledge?

A. I can answer that only this way: I did not listen to the other four tapes.

[fol. 312] Q. I presume, then, the inference I am to draw from that answer is obviously—

A. No. You are drawing an inference that I didn't subscribe to because I had received information which I considered to be as reliable or certainly almost as reliable as the information obtained in my listening to the one tape that the other tapes contained similar-type recordings.

Q. That all may be very well, Mr. Sherk, and I don't want to, above all things, be argumentative. But, an affidavit as you know, and especially your being a lawyer, is made upon knowledge of the affiant which means personal knowledge of the affiant. You realize that? What other people told you, of course, is not even permissible unless it is an admission of a defendant, generally speaking. See? Now, from what you knew of your own knowledge could you tell and state as of your own knowledge whether or not the room conversations had been secured by means of a device on the end of the instrument in which you speak and hear or by a tap at some other place?

A. It was my impression—and we are still talking, now, about what I heard on—

Q. What you knew?

A. —what I had heard on May 22nd, is that correct? Is that correct? Is that—

Q. Yes.

[fol. 313] A. It was my impression and it is my—it was my belief then and my present belief now that at least some of the conversations which we have referred to as room conversations were made from a microphone concealed in the telephone instrument itself. And the reason that I am of that belief is that some of the telephone conversations start out with the—with one party very loud and clear and the other party very faint and indistinct. Then after a few moments there will be a definite change in the quality of the record.

The room background noise disappears and both parties to the telephone conversation come in at about the same

strength. Therefore, the answer to your question is that it is my belief that at least some of the so-called room conversations came in through a microphone concealed in the telephone instrument. I must emphasize again that that is merely—

Q. Merely your—

A. —belief based on what I heard.

Mr. Luckey: If Your Honor please, I dislike to interrupt counsel's line of questioning. And, at the risk of seeming repetitious I would appreciate the Court's patience for one observation. It seems to me that counsel's position here, if tenable despite the assertion of any number of theories, is on well-founded, established law that the only real basis of objection to the Government's present possession of [fol. 314] these tapes is an illegal search and seizure of the defendant Clark's premises. Now, if that be the fact the only conceivable established body of law which would prevent their use here would be a showing of collusion or cooperation of the Federal officers in connection with that search.

Now, we are spending a great deal of time and effort in attacking the Federal search warrant. I submit that if there had been no search warrant at all, if these documents had been turned over to the Federal authorities on a silver platter by the State officials or had the Government received them in some other manner that did not go to the original illegality, if it was illegal, of the original search and seizure, these defendants would be in no position to complain.

The privacy that the Fourth Amendment protects and their—as to them is a search of premises when this—when there is a search of premises that they have an interest in. These tapes, in fact, the evidence is, were received from a bank. Now, certainly there is no assertion here that the defendants claimed an interest in that bank; that the premises from which these were taken were in any way theirs. And, it seems to me we are digressing from the issue that is before the Court.

I don't suggest that the Court should restrict counsel in his appropriate theories, but where the law appears settled

[fol. 315] on a position it seems that it's an unnecessary burden to have extraneous issues inserted in the record.

Now, I suggest further that there has been no—of course, he can't put in all that he has at once. But, there has been no showing definitely that these defendants even claimed the necessary interest in this property. There is a division of authority on it and I wouldn't for anything in the world suggest to Your Honor otherwise. I am confident Your Honor is aware that there is a split of authority on it. But, there are cases that indicate that a person cannot assert the illegality of search without also accepting the perils of acknowledgement of all the ownership, and so forth, that goes with it.

Now, there has been no evidence here other than an assertion in the motion by counsel that these defendants, which one or either of them, claimed to own this material or had an interest in the premises from which they were taken; that is, by the Government. There has been an allegation of an original illegal search of one of the parties' premises. There has been no testimony sought from this witness that would in any way show that there was any collusion on the part of the Federal agents to accomplish it.

The Court: Well, I think your motion as now presented forces the Court to at this time rule on one of the very substances of the matter.

[fol. 316] May I ask you, Mr. Luckey—

Mr. Crawford: May I be heard?

The Court: Surely you may be heard. But, let me lay the premise first.

Mr. Crawford: Pardon.

The Court: May I ask you, Mr. Luckey, what is the Government's position—do you rely upon a valid search and seizure under the—let me put it this way: Do you contend that the possession of the articles by this Court now depends upon the validity of the Federal search and seizure?

Mr. Luckey: I don't suggest, Your Honor, that the validity of the Government's present possession depends upon the validity of the search and seizure as to these defendants.

The Court: Yes. I understand your position.

Mr. Luckey: Because, unless there is an original—unless the Government has infringed upon their constitutional rights.

The Court: In other words, I take it it is your position that this Court's inquiry is not whether or not—it makes no difference whether or not the Federal seizure was pursuant to a valid search warrant.

Mr. Luckey: That's right. Because, I suggest, Your Honor, that under the cases if the State authorities who first themselves conducted the illegal search and seizure had handed them over on a silver platter to the Federal authorities they would have been admissible.

[fol. 317] The Court: Now, of course, we understand—

Mr. Luckey: These are subsequent matters of getting them that are mere formalities and serve to get them there perhaps by a more delicate and discreet manner. But, as to the necessity of sustaining the search warrant, I don't for one minute suggest that it isn't a valid search warrant. But, my point is that we are wasting time on an inquiry that isn't relevant.

The Court: Well, if that's the effect, you force me right now to decide the question.

May I inquire now from the defendants? Is it your position in this matter that if this was not a valid search warrant the Government can in no event sustain their rights to this property?

Mr. Crawford: That is one of our grounds.

The Court: All right. I will have to hear you on it, then, because I have got to determine the phase of this motion as to, first of all, whether the Government will not abandon its position. It insists that it is a valid search warrant. So, now, I have got to determine whether or not it makes any difference whether or not it is a valid search warrant.

So, I will hear you, Mr. Crawford.

Mr. Crawford: Well, I am not through my evidence on whether or not it is valid.

[fol. 318] The Court: The Government has forced me to rule whether or not your inquiry is even proper.

Mr. Crawford: Your Honor, I don't believe that the United States Attorney has—it has occurred to him what the Government's position is at this time.

Now, I could appreciate and agree with the Government's position with these defendants not indicted. But, now they are indicted. What are they indicted for? They're indicted because, necessarily, in order—and in order to prove the indictment and each count thereof the Government must prove that these defendants were in possession or were the owners of these very articles which the defendants are seeking to suppress.

Now, that, you see, is after indictment. Now, before indictment we certainly would be in a different position. Before indictment I believe it unquestionably would be incumbent upon the defendant in order to maintain this motion to suppress to show, one—either, one, they were the owners—

The Court: Well, I don't want to interrupt your train of thought on it, Mr. Crawford, but we are not involved in that question now.

Mr. Crawford: Well, I thought he raised the very question? I took notes? He says the—

The Court: Well—

Mr. Crawford: He said the defendants must accept the [fol. 319] illegality of the search without admitting the peril. I took it—I understood him to say that we must show that we had an interest in this search.

The Court: Granted, the District Attorney did say that. But, he said—of course, your evidence is not in yet.

Mr. Crawford: It isn't in, Your Honor.

The Court: But, that isn't his point of inquiry. His point of inquiry is now objecting to your line of examination of this witness as to his knowledge in connection with the search warrant, in his execution of the search warrant. Now, the Government has raised the question that it does not make any difference, conceding for the sake of argument that this was an invalid search warrant—it makes no difference to the Government's right to use this evidence.

Mr. Crawford: All right.

The Court: So, I have asked you now do you—

Mr. Crawford: I will show this:—

The Court: All right.

Mr. Crawford: —I will show, then, that on May 17, 1956, that these articles, as far as we know—and, when Your Honor hears the evidence you will realize why I say "as far as we know"—were in the residence and home, dwelling house and abode of the defendant Clark where they were taken by virtue of an illegal raid by the Sheriff of Multnomah County, Oregon; that thereafter the same identical articles were given by the Sheriff of Multnomah [fol. 320] County, Oregon, to the Attorney General of the State of Oregon—or, rather, into the hands of one of the officers of the State Police for and on account of the Attorney General of the State of Oregon in the presence of the Attorney General of the State of Oregon and that thereafter the same tapes and other evidence—other articles of evidence were under the control and in the possession of the same Oregon State policemen; and that pursuant to this search warrant which is in evidence here and in the files of this case the F.B.I. through its agents took and now have possession of the tapes. And, I will show an unbroken line, I do believe.

The Court: All right. I haven't yet been able to make the query that's in my mind. I can't get it across.

Now, accepting your statement as it is, do you contend that the Government's possession would still be illegal if the State policemen had turned them over to Mr. Sherk without a search warrant?

Mr. Crawford: Yes.

The Court: Then, it is your position if the search warrant is valid then the Government's right to it—had a right to take them from the police officer?

Mr. Crawford: No.

The Court: All right. Then, why do you make an inquiry as to the illegality of the search warrant?

Mr. Crawford: As I stated here before, Your Honor— [fol. 321] I will restate my theories. And, I believe that I am on firm ground. 1. If on the original raid—

The Court: Now, we are not concerned with the original raid. We are only concerned at this point of inquiry as to

whether or not the search warrant held by Mr. Sherk was a valid search warrant.

Mr. Crawford: That's all I was inquiring about.

The Court: That is the basis of Mr. Luckey's objection. Because, he said it doesn't make any difference whether it's valid or not.

Mr. Crawford: Well, I do not agree with Mr. Luckey. Definitely, emphatically not. It's hard, Your Honor, to apply—

The Court: Well, now, let me put it this way: then, your position about it is that, assuming you cannot prevail upon your theory that the Federal Government had a hand in the initial raid and that they are free of any activity in that part—nevertheless, their subsequent search warrant was invalid and they had no authority to take it from the State policeman?

Mr. Crawford: That's correct, among other things. And, we have other reasons, also, which I have heretofore stated.

The Court: Well, I am forced to decide it. I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the [fol. 322] time he took possession of the tapes; that if his taking possession is illegal it has to be upon some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.

Mr. Crawford: In other words, now, Your Honor, is definitely ruling at this time?

The Court: From here on out the Court will make no inquiry.

Mr. Crawford: In other words, I want to make sure that I understand—

The Court: I want you to understand it.

Mr. Crawford: —so that I don't further intrude upon Your Honor's ruling. I will save an exception of Your Honor's ruling, of course.

The Court: Yes. I want your record to be protected.

Mr. Crawford: Your Honor's ruling, as I understand it,

is that it will have the effect of preventing the defendants from further inquiring into the validity of the search and seizure September 5, 1956, made by the Federal Bureau of Investigation?

The Court: No. No. That may be—under your theory that may be so permeated that it would revert back to the original time. I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes [fol. 323] no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not. His right of possession must be based upon some other ground than that of a valid search warrant in his possession.

Now, that is the theory of the Government.

Mr. Crawford: I wonder if the Reporter would read that to me.

The Court: I will try once more.

Mr. Crawford: I will have to state sincerely to Your Honor that I was trying to understand the effect of Your Honor's ruling and what it would prevent me from attempting to do.

The Court: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.

Mr. Crawford: Will the Government admit the invalidity of the search warrant?

The Court: No. The Government merely says that it does not make any difference whether it is invalid or valid. So, the Court will accept that theory. From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk.

[fol. 324] Mr. Crawford: Then, I take it it would be useless for me to establish any further evidence with that objection in view?

The Court: You may make your record.

Mr. Crawford: May I make my record?

The Court: To protect your theory about it.

By Mr. Crawford:

Q. Mr. Sherk, did you take the article in question, the evidence in question, into your possession by virtue of the search warrant which is in evidence here?

A. Yes, sir.

Mr. Luckey: Excuse me, Your Honor. By virtue of the Court's ruling I would move to strike the question and the answer as immaterial. However, understanding, of course, that if he is submitting it on the basis of his record that it is outside the record of the Court's consideration.

The Court: Well, it all depends. So far as this witness is concerned he certainly was armed with what purported to be a search warrant.

Mr. Luckey: That's right, Your Honor.

The Court: And, for him not to be permitted to tell why he did such an act would deprive him of doing the act in line with his duty. That does not necessarily hold that the search warrant he had was valid or invalid.

Mr. Luckey: I will withdraw the objection, Your Honor, with the reservation that as subsequent matters may de- [fol. 325] velop I wouldn't want to waive them.

The Court: I understand your position about it.

By Mr. Crawford:

Q. You didn't take this evidence from anybody by force?

A. No, sir.

Q. I mean, physical force?

A. No, sir. I think I can simplify your line of query. It was my understanding and belief at the time and it is now that I was acting legally and in response to a legal and valid Federal search warrant.

Q. And you had obtained that search warrant—

A. Yes, sir.

Q. —from this Court or an officer of this Court?

A. From the United States Commissioner.

Mr. Crawford: Yes. In view of Your Honor's ruling—oh, I have one question I want to ask him.

The Court: All right.

By Mr. Crawford:

Q. How long have you been in this District, Mr. Sherk?

A. I was here for one—for a little over a year in 1948 and '49 and I have been stationed at Portland, Oregon, since 1954. Between 1949 and 1954 I was resident agent at Eugene, Oregon.

Q. When did you return to this office?

A. 1954.

[fol. 326] Q. '54?

A. Yes.

Q. And what month of the year?

A. In November.

Q. Now, in the performance of your duties have you had occasion to discover violations of State law?

A. Yes. I have discovered violations of State law in connection with Federal investigations on a number of occasions.

Q. What have you done with that evidence or information that you so uncovered?

A. That information has, in most instances, wherever proper been turned over to the appropriate State or Federal law-enforcement officer having jurisdiction over the crime involved.

Q. I don't mea Federal, I mean State now.

A. I said Federal and State.

Q. And State?

A. Yes.

Q. But, I only asked in inquiring to violations of the State law. Have you informed and turned that evidence over to the appropriate State authorities?

A. Yes; through proper channels.

Q. Yes. And as far as you are concerned is there a common practice and understanding that you will do that [fol. 327] in this community?

A. Certainly.

Q. Yes. You do not concern yourself with, we will say,—I mean, primarily concern yourself with the violations of the laws relating to currency such as counterfeiting?

A. No, sir. That is not within the jurisdiction of the F.B.I.

Q. It is not within—

A. (Witness shakes head.)

Q. Is there a separate agency; that is, enforcement agency of the United States Government—

A. Yes, sir.

Q. —that is charged with the primary duty of enforcing narcotic laws?

A. Yes. There is the Narcotic Bureau of the Treasury Department who enforce those laws.

Q. That is the Treasury Department. And, if you arrested a person—let us make a hypothetical. If you arrested a person and found that he had been guilty of a burglary which involved State law would you turn that evidence over to the State authority?

A. You are using the word "evidence." I hope that you mean it's synonymous with information.

Q. Evidence and information in a general term.

A. Certainly.

[fol. 328] Q. Yes. You were served here with a subpoena duces tecum?

. . . . . .

A. Yes, I received a subpoena duces tecum.

[fol. 334] Q. Mr. Sherk, now, what was the soonest date after January 1, 1956, and before May 17, 1956, that you had any knowledge of a violation of Section 605 by these defendants?

A. Will you give me those dates again?

Q. Well, I took a rather broad cut in there. I went back as far as January 1, '56, and brought it up to May 17, 1956.

A. At no time during that period.

[fol. 335] Q. At no time during what period?

A. At no—

Q. Oh. During that period. Well, here, did you make any investigation of these defendants in relation to violations of Section 605, 47 U.S.C.A. prior to May 17, 1956?

A. I will go further than that, sir. I made no investigation whatever prior to May 22, 1956, none at all.

Q. Now, just to make clear, Mr. Sherk, that I have covered this, I was not only talking about investigation that ended in written reports but I am also talking of in-

vestigations in its broadest sense including but not restricted to oral reports.

A. Yes, sir. I understood that and my answer is the same.

Q. It is the same?

A. I made no investigation, inquiry, took no action whatever oral, written, or otherwise in this case prior to May 22, 1956.

Q. And, your answer applies, of course, to any violation of Section 605, 47 U.S.C.A., as regards these defendants?

A. That is correct.

Mr. Crawford: Thank you. Now, for the sake of the record, Your Honor, and for that purpose only, I do not wish to contest or in any way reiterate the ruling. I am making this request merely for the purposes of the record and for no other reason.

[fol. 336] I now ask this witness to produce any reports that he has made to his superior or to the United States Attorney during the periods of time mentioned in the subpoena duces tecum.

The Court: Let the record show your request is denied.

Mr. Crawford: And I save an exception.

The Court: You may.

Mr. Crawford: You may cross-examine.

Cross examination.

By Mr. Luckey:

Q. Mr. Sherk, you mentioned that there was some cooperation between your agency and the State agencies with reference to law enforcement?

A. Yes, sir.

Q. You operate independently, do you not?

A. Yes, we do.

Q. And, the cooperation of which you speak is the exchange of information after offenses that may be within the jurisdiction of the respective agencies has developed, is that right?

A. That is correct, sir.

Q. Did you have any previous understanding with any official of the State of Oregon or Multnomah County or City of Portland, with reference to the violation that is involved here involving these defendants on May 17th or any time prior thereto of 1956?

[fol. 337] A. No, sir.

Q. After May 17th did you have any cooperation with them whatever with reference to this matter until May 22nd of any kind?

A. No, sir.

Q. Was there any other understanding between you and any State official that if any evidence of a Federal violation were uncovered in a particular raid at the home of Raymond Clark on May 17, 1956, that such evidence would be turned over to you?

A. No, sir.

Q. Was there any other understanding between you and any State official that if any evidence of a Federal violation were uncovered in a particular raid at the home of Raymond Clark on May 17, 1956, that such evidence would be turned over to you?

A. No, sir.

Q. As a matter of fact in the event that State officers uncovered evidence of Federal violations, is it your decision or the decision of your agency whether or not Federal prosecution of those offenses will be undertaken?

A. No, sir; that is the decision of the United States Attorney.

* * * * * * * *

[fol. 339] Oscar Howlett, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. Your full name, sir?

A. Oscar D. Howlett.

Q. Where do you reside, Mr. Howlett?

A. 4710 Southeast Malden Street, Portland, Oregon.

Q. What is your occupation or profession?

A. Deputy District Attorney.

Q. Are you a lawyer?

A. Yes.

Q. You're a deputy district attorney in Multnomah County, Oregon?

A. Yes, sir.

Q. And that is on the staff of William M. Langley?

A. Yes.

Q. When were you admitted to practice law, Mr. Howlett?

A. 1950.

Q. 1950?

A. Yes.

Q. Have you practiced in this community since that time?

A. No.

Q. Where have you practiced?

[fol. 340] A. Well, I was four years in the Service during the Korean deal—Korean War.

Q. Now, Mr. Howlett, do you recall the case of State of Oregon, Ex Rel William M. Langley, Plaintiff, vs. Ray Clark and Sonny Martin, Defendants, Number 64256 in the District Court of the State of Oregon for Multnomah County?

A. Yes.

Q. Do you recall that was a motion to suppress the evidence—

A. Yes.

Q. —in that court?

A. Yes.

Q. Now, at that time did you represent the District Attorney's office?

A. Yes.

Q. In that proceeding?

A. Yes.

Q. You were the one deputy that was on the case during all of the period of time?

A. Yes, there was. That's right.

Q. You were there from the first and you continued on until the matter was—reached a conclusion?

A. That is correct.

Q. You were served with a subpoena duces tecum to bring with you a certain affidavit by you dated May the 22nd, 1956, part of which affidavit was referred to by you in [fol. 341] the proceedings in Judge Mears' courtroom on that day. Did you bring that?

A. No, I don't have that. I turned that over, submitted that to the Court in Judge Mears' court. And I think the Attorney General has all the records in that case. But, if you have a copy there I would recognize the copy.

Q. You were also asked to bring with you an answer to the motion to suppress which was filed or offered for filing in Judge Mears' court on May 23, '56.

A. And the same situation is in that case too. But, if you have the copy of the answer there I would recognize it.

Q. Well, we'll see in just a moment, Mr. Howlett.

Mr. Price.

Your Honor, for convenience I am going to hand a copy of the transcript of the proceedings in the District Court to Mr. Howlett for his reference.

(Whereupon the Crier hands the document mentioned by Mr. Crawford to the witness.)

The Court: Thank you.

Mr. Crawford: Is that all right? You have no objection to it?

Mr. Luckey: No.

Mr. Crawford: Thank you.

Q. Mr. Howlett, I request you to turn to page 2 of that [fol. 342] transcript.

A. Yes.

Q. Would you read it?

Mr. Luckey: If the Court please, is counsel offering this document?

Mr. Crawford: Well, I haven't finished my question, Your Honor. I didn't get a chance to finish.

Q. Will you read it to yourself, Mr. Howlett?

Mr. Luckey: I'm very sorry, Mr. Crawford.

The Witness: Yes. Yes. I remember that.

By Mr. Crawford:

Q. Do you remember that?
A. Yes.
Q. And you read into the record of that case that letter?
A. Did I do it? Yes.
Q. You did it, didn't you?
A. That's right.
Q. Now, I call your attention to the second paragraph of that letter.
A. Uh huh.

* * * * * * *

[fol. 343] By Mr. Crawford:

Q. Now, that was a letter bearing what date?
A. The 18th, I believe.
Q. 18th of May, 1956?
A. Right.
Q. Was that written to whom?
A. The Attorney General, Robert Thornton.
Q. By whom?
A. Mr. Langley.
Q. Is that the District Attorney of Multnomah County?
A. That's correct.

(At this point a document entitled "Answer to Motion to Suppress and Return or Destroy Evidence" was marked for identification as Defendants' Exhibit 12.)

By Mr. Crawford:

Q. Now, at that time, May 18, 1956, was the District Attorney's office contemplating turning over the evidence of seized material in the raid to the Federal Government [fol. 344] for violation of wire tapping?
A. May I give my explanation? I have to explain it by more than a Yes or No, really. Other than to say—no. I will make the answer this way: I can't answer that question.
Q. Why did you read the letter?
A. I was given the letter by Mr. Langley before I went down there.

Q. Mr. Howlett, were you present when Mr. Langley testified in this court?

A. Yes, I was.

Q. Did you hear him say that he affirmed what you did in this case?

A. Yes.

Q. Yes.

A. And I read the letter. But, you are asking on the 18th of May did I—did our office contemplate this and you are asking something that I don't know about because, really, on the 18th of May I didn't know he wrote the letter.

On the 21st—or, 22nd of May I knew about the letter when we had our big hearing. Do I make myself clear?

Q. On the 21st of May that you read this letter?

A. Yes. That's right.

Mr. Luckey: Well, talking about a letter, I suggest, Your Honor, it would be well to say who the letter was ad-
[fol. 345] dressed to.

The Court: I think that has been identified as a letter to the Attorney General.

Mr. Luckey: State Attorney General?

Mr. Crawford: Yes.

The Court: Yes.

By Mr. Crawford:

Q. Now, were you at that time—your office—

A. On what date, now?

Q. On the 21st of May.

A. On the 21st of May.

Q. Were you holding that evidence that was seized in the raid upon Ray Clark's residence?

A. Was our office?

Q. Yes?

A. No.

Q. Well, Mr. Howlett, when I say "you" I mean the State authorities.

A. Oh. Yes.

Q. You were acting together?

A. The Sheriff did.

Q. I don't mean the person that had the actual physical custody.

A. No. That's correct.

Q. Now, again, were you at that time holding them for [fol. 346] the purpose of turning over the evidence to the Federal authorities for a prosecution under the Federal wire-tapping law?

A. Oh, no, not at that time. That wasn't in my mind, anyway. My mind was to proceed with State prosecution.

Q. You are satisfied that your superior, Mr. Langley, wrote this letter?

A. Oh, yes.

Q. There is no doubt about that?

A. That's correct.

Q. Now, Mr. Howlett, you said if you had a copy of this answer that you could identify it.

Mr. Price, will you please hand that to the witness?

(Whereupon the Crier hands a document to the witness.)

* * * * * * *

Mr. Crawford: Defendants' Exhibit 12.

The Witness: Yes. Yes. I recognize this.

By Mr. Crawford:

Q. Is that your signature on there—

A. That is right.

Q. —Mr. Howlett? Is that your signature?

A. Oh, yes. Yes, sir.

Q. In other words, the copies furnished the attorneys for [fol. 347] the parties in that—

A. Are identical.

Q. —case were all signed personally by you—

A. Correct.

Q. —were they not? Now, I call your attention expressly to subparagraph 4 of that so-called answer to the motion to suppress and return or destroy evidence.

A. Yes.

Q. You see that?

A. Yes. I remember it.

Q. Now, in that paragraph of the answer you specifically mention—

Mr. Luckey: If the Court please, is this document going to be in evidence? He asked him to state what he specifically mentioned.

Mr. Crawford: Very well.

Q. Mr. Howlett, that is the answer. That is a true and correct copy of the answer that was filed in that proceeding, is it not?

A. That's correct.

Q. And you signed that personally, that particular copy (indicating), did you not?

A. Yes.

Mr. Crawford: Would you show it to Mr. Luckey?

I offer that in evidence.

[fol. 348] The Court: Any objection?

Mr. Luckey: I would object to it, Your Honor, on the basis that the statement of a return in a State Court proceeding would have no relevancy to this inquiry.

Mr. Crawford: I offer it for the purpose of showing that it is of some evidence that in making the raid of May 17th that the State officials had in mind a prosecution of the Federal law and that that evidence was to be used, if possible, for that purpose.

The Court: I don't see any date on this answer, Mr. Crawford.

Mr. Crawford: I was going to interrogate him further as to that.

The Witness: I think the date is, I believe, the 22nd of May.

By Mr. Crawford:

Q. The 22nd of May?

A. I believe so.

Q. Let's see if we can agree to that, Mr. Howlett.

A. If I may interpose this: I think on Monday we went down to Judge Mears' court and we asked for a week over and he gave us just 24 hours. But, we took Herder's testimony because he had come from out of town.

Q. That's right.

A. And, then, the next day at 2:00 o'clock we commenced the regular proceedings. And I think that I submitted [fol. 349] that answer on the 22nd.

Q. All right.

A. Certainly not earlier than that.

Q. You know when you drew it up, Mr. Howlett?

A. I drew it up about five minutes before we submitted it. That's why it isn't verified. Didn't get time.

Q. Well—

The Court: Yes. I don't think that it makes any particular difference. But I will receive it anyway in connection with your theory.

(Whereupon a document entitled "Answer to Motion to Suppress and Return or Destroy Evidence" previously marked for identification as Defendants' Exhibit 12 was received in evidence.)

Mr. Crawford: Yes.

Q. Now, you urged at that time in opposition to the defendants' motion to suppress, did you not, that the District Court had—lacked the power and jurisdiction to suppress because of the seized evidence that constituted violations of Section 605 of the Federal Communication Act, did you not? You urged that at that time?

A. We had a specific reason for it. We did, but we had a specific reason for doing so.

Q. Well, did you urge it?

A. As part—that was part of my urgings, yes, part of my argument.

[fol. 350] Q. Yes. Now, Mr. Howlett—

The Court: I take it the District Court wasn't much impressed with the argument.

The Witness: That's correct, Your Honor.

By Mr. Crawford:

Q. Through all of those proceedings in the District Court you, acting for the District Attorney of Multnomah County, raised in opposition to the defendants' motion to suppress

in that court that this was a violation of Section 605, U.S.C.A., Title 47, did you not?

A. We raised that during the course of the trial, yes.

Q. During all of those proceedings that were had there?

A. There were other reasons I expressed too. But that was one.

Q. But that one was raised all the time, was it not?

A. Well, it may be a play on words. I guess, maybe, say all the time. I don't remember expressing it more than once or twice, but—

Q. Well, here.

A. The record shows whatever happened.

Q. Would you turn to that transcript on page 26?

Mr. Luckey: The fact that it was urged would have all the significance that it's ever going to have. The fact that it may have been repeated would be irrelevant.

Mr. Crawford: Well, now, Your Honor—

The Court: Well, the question has been put to the wit- [fol. 351] ness did he have any intention, or words to that effect, or contemplate any Federal prosecution and he answered "No," that he didn't have. And I think counsel should be permitted to go to any extent that they deem is necessary to bring out statements of this witness that they may claim are contradictory to that. So you may proceed.

By Mr. Crawford:

Q. Mr. Howlett, will you read to yourself, now, please, the last four lines of the first paragraph on page 26 of the transcript? Just read it to yourself so your memory will be refreshed.

A. Yes, I have read that.

Q. Do you see that?

A. Yes, I do.

Q. So, at that time you represented to the Court orally that the evidence was being held by the Sheriff of Multnomah County for a violation of the Federal Communications Act and that this Court has no jurisdiction to interfere with a Federal prosecution? You made that statement, did you not?

A. I made that statement in part. Now, that's taken out of context.

Q. You had other reasons, didn't you?

A. I had other reasons to express to the Court to urge them not to return the property to Elkins and Clark.

Q. Yes?

A. This was one of my reasons I expressed, yes.

[fol. 352] Q. And one of these reasons was what I have read to you?

A. That is correct. That was one of them.

Q. Mr. Howlett, you recall the attorney who represented the defendants in that case—in those cases, did you not?

A. Yes.

Q. Do you recall that Mr. Raymond represented Mr. Clark; Mr. Fallgren represented Mr. Clark, and that I represented Sonny Martin?

A. Correct.

Q. Now, did those attorneys, during that proceeding, make demand upon you to produce in the court the seized evidence?

A. Yes, you did.

Q. What did you tell the Court? What reason did you give the Court for not producing the evidence?

A. Well, the record would be the best—better than my memory, I think. But, as I remember the situation, one of the reasons I gave the Court was that they lacked jurisdiction for the reasons that on the morning of the 22nd the Grand Jury of Multnomah County had returned the indictment charging Elkins and Clark with the violation of the State wire-tapping law and that therefore the evidence should be held by—for the—by the Sheriff Multnomah County for the Circuit Court and that the District Court no longer had any jurisdiction over the evidence.

[fol. 353] Q. Did you also give other reasons, Mr. Howlett?

A. Yes. Since the Judge showed a tendency to think that the search was illegal we also showed—I also expressed to the Court the fact that this being a violation of Federal wire-tapping law, that to return it, to return the

evidence to Elkins and Clark, of course, would be to destroy it and there would be no possibility of prosecution by the Federal authorities. And we might even be considered an accessory to the crime.

Q. I see. Now, to excuse your failure and the failure of Sheriff Schrunk to physically produce the property in court, at least, during May 22nd and the early part of May 23rd, did you give Judge Mears any other reasons?

A. It must be in there. You must be reading it, but I don't remember it. Could you tell me what page to find it on?

Q. Yes. Look on page 47, Mr. Howlett. Look on the last paragraph of the page.

(Witness reads transcript.)

The Witness: Did I say all that? Yes.

By Mr. Crawford:

Q. You have read that, haven't you?

A. Yes.

Q. You will refer now by reference to the transcript and you may acquaint yourself with the date upon which you said that.

[fol. 354] A. Well, you tell me. I would probably—

Q. May 22, 19—

A. May 22nd.

Q. All right. At that time you gave as one of the reasons that these tapes and whatnot were carefully locked in the vault, didn't you?

A. Yes. I said—yes.

Q. Yes. And, they were of a very delicate nature and you wanted to take care of them, didn't you?

A. Uh huh.

Q. Yes. Did you ever tell the Court at any time during that proceeding that copies had been made of the tapes, Mr. Howlett?

A. I don't remember. Is it in there?

Q. You didn't, did you?

A. Pardon?

Q. You did not, did you?

A. I don't recall saying it, no. But, the way you asked it I suppose it must be in here.

Q. No. I am not trying—really, I want you to believe me.

A. Yes.

Q. You did not tell the Court that the reason you could not bring the tapes into court was, one, copies were being made of it, did you?

A. Oh, no. No, I guess not.

[fol. 355] Q. No. You didn't tell the Court that?

A. No.

Q. You didn't tell the Court, did you, that one of the reasons you couldn't bring those tapes into court was because Mr. Sherk of the F.B.I. was listening to the tapes, did you?

A. No, I didn't. No. He was listening.

Q. You didn't tell Judge Mears that you couldn't bring those copies into court because Mr. Langley was slightly tangled up with tape up in his office, did you?

A. Oh, no. No, I didn't tell him about that.

Q. No. But, your concern in your representation to the Court was that "We wanted to guard these things because they were of a very delicate nature," isn't that right?

A. Yes.

Q. Yes. And, along about that time the Journal came out with their copy of the tapes, didn't they; published it; do you recall that?

A. I think somebody brought in the Journal copy in the afternoon.

Q. Yes?

A. Held it up, introduced it in evidence. Something else.

Q. When were the tapes finally brought into that court, Mr. Howlett?

A. Mr. Crawford, I don't say—I am trying to recall that. [fol. 356] The record must show it.

Q. May I refresh your memory?

A. Do you know where it is in—

Q. It was the last part of the last day that the tapes were finally produced.

A. We didn't get them down there on the 22nd. That's the afternoon. We didn't get them down there that day? I can't recall. The next day we started in the morning.

Q. But, still, the tapes were not produced at first in the morning, were they? They weren't produced?

A. Well, if that's so, I don't recall. I know that we had an argument about them at one time. But just when they were brought back, I really don't know. I honestly don't. It's shown here somewhere, possibly.

Q. You look at that but don't take too long. But, see if you can't, tell from the latter part of the transcript when you brought those tapes in?

A. I have no way of finding—

Mr. Luckey: Your Honor, one question: I don't suppose that counsel intended to represent—he made reference to the fact that the F.B.I. might have been listening to the tapes—that there was any intendment upon the F.B.I. to hold them up from any State grand jury or court.

Mr. Crawford: Oh, no. No, I do not. No, I don't think that Mr. Sherk had any idea at all that Judge Mears down [fol. 357] on the third floor was calling for those tapes. I don't think he had any idea in the world and I don't want—

Mr. Luckey: All right.

Mr. Crawford: I don't want that inference to even be considered in this court.

The Witness: Well, I see there where we have got them in evidence over here on page 73 and 74, but just when we brought them in, I don't know.

By Mr. Crawford:

Q. Do you recall Mr. Minielly bringing in a tape that was all tangled up?

A. He must have brought a tape in. I don't think—didn't he have it straightened out?

Q. In a paper sack?

A. Well, wasn't it fixed up? Oh. I guess he did maybe bring it in. That fellow fixed it up, didn't he, the fellow from KPOJ?

Q. Now, Oscar—

A. I can't remember.

Q. —during the time that you were making these representations to the Court did you know that that tape was tangled up in Mr. Langley's office?

A. Well, it seems to me I was up in his office when I saw the tape in sort of a—fished around a bit, yes.

Q. It was kind of—just kind of tangled, wasn't it?

A. A little bit.

[fol. 358] Q. It took four hours to straighten it out, didn't it?

A. That's what the man said.

Q. Now, did you advise the Court that Mr. Langley was playing those tapes at that time?

A. No, I—I don't believe I told the Court. But, it would be in here if I did, in the record.

Mr. Crawford: I have no further questions.

The Court: Cross-examine.

Cross examination.

By Mr. Luckey:

Q. Mr. Howlett, did you ever have any contact with any Federal officer with reference to making these representations to the Court about any Federal violation or Federal prosecution prior to your representations?

A. Never. I never saw Mr. Sherk nor any member of the F.B.I.

Q. And you had other intentions with reference to the tapes and the evidence than Federal prosecution in connection with the search and seizure?

A. My intent was to proceed with the State prosecution. And the only reason I mention in the affidavit and in the answer concerning the violation of Federal law was my impression that Judge Mears was—was weak with the case—I say that respectfully. But, I felt that the attitude was a bit weak and I wanted to apprise him of the fact that [fol. 359] the evidence should be held and not returned if he in fact did find an illegal search and seizure.

Q. Was that then a make-weight argument?

A. That was a make-weight argument, entirely.

Mr. Luckey: Thank you.

Mr. Crawford: Just a minute.

Redirect examination.

By Mr. Crawford:

Q. Oscar, you don't mean to tell me that you would advance an argument to a Court which you thought was frivolous, would you?

A. Not frivolous, just—

Q. Not worthy of consideration, unmeritorious?

A. Oh, y—oh, no. I would never do that.

Q. Oh, no.

A. But, it is not of that nature. This kind of an argument is protective of—would protect justice.

Q. I see. And, especially allow people to make copies of tapes, then?

A. Well, that I didn't know about. If there were any copies made I didn't know anything about them.

Q. You have characterized Judge Mears' attitude as weak.

A. Well, towards the certain feature. I didn't want to give him any—I wanted him to know what the entire situation was and it was a fact that it was a violation of Fed-
[fol. 360] eral—of the Federal wire-tapping law because I had listened to this telephone conversation in the Grand Jury and it was clearly telephone conversation.

Q. When did you listen to them in the Grand Jury?

A. The morning of the 22nd.

Q. Why did you read that letter on the 21st?

A. Pardon?

Q. Why did you read the letter to the Court on the 21st?

A. Well, I don't see any inconsistency.

Q. You also mentioned in that letter, did you not, that there was a violation of the Federal wire-tapping act?

A. That's correct.

Q. Did you listen to them before that?

A. No. No, sir.

* * * * * * * *

[fol. 361] Mr. Crawford: Mr. Lonergan, would you take the stand, please?

HOWARD R. LONERGAN, produced as a witness in behalf of the defendants, being first duly sworn, by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name?
A. I have already done so, sir.
Q. Well, just do it again for the record.
A. It's done for the record.

The Court: Well, perhaps Mr. Crawford doesn't know it, Mr. Lonergan. So, advise him.
The Witness: My full name is Howard R. Lonergan.
Mr. Crawford: Thank you.

Q. Where do you reside, Mr. Lonergan?
A. 9645 Southwest Ardenwood Street; Beaverton, Oregon.
Q. What is your profession, sir?
A. I am a lawyer.
Q. How long have you been admitted?
A. I was admitted in 1938 in the State of New York and in 1951 in the State of Oregon.
Q. What was that New York date?
A. 1938.
[fol. 362] Q. Now, what additional positions have you held with the State of Oregon as an attorney?
A. I have been Assistant Attorney General and a deputy district attorney.
Q. Is that a deputy district attorney in Multnomah County?
A. Yes; Mr. Crawford.
Q. Were you a deputy district attorney of Multnomah County during the year 1956?
A. Yes; Mr. Crawford.
Q. Are you now a District Attorney of Multnomah County?
A. No; Mr. Crawford.
Q. When did you cease being a District Attorney of Multnomah County?

A. The 31st of March, 1957.

Q. Were you a District Attorney on or about January 10, 1957?

A. Yes; Mr. Crawford.

* * * * * * *

[fol. 363] By Mr. Crawford:

Q. Mr. Lonergan, what official positions have you held, if any, with the United States Government?

A. I have been and still am an officer in the United States Naval Reserve. I have been—

Q. I mean, in regard to your profession.

A. I have been a law clerk to two Federal judges.

Q. In this district?

A. In this district.

Q. Did you ever work for the Federal Bureau of Investigation?

A. Yes; Mr. Crawford.

Q. When?

A. I resigned in 1943.

Q. 1943?

A. Yes; Mr. Crawford.

Q. I take it you have not been employed by that bureau since that time?

A. No; Mr. Crawford.

Q. Now, in your official capacity—oh, by the way, let me ask you another question. In the District Attorney's office were you not the chief criminal deputy of that office?

A. Yes; Mr. Crawford.

Q. In Mr. Langley's office?

A. That's correct.

Q. Now, did you present to the Grand Jury evidence which resulted in the indictment of James B. Elkins and Raymond F. Clark—

[fol. 364] A. No; Mr. Crawford.

Q. —on wire-tapping charges?

A. No; Mr. Crawford.

Q. Did you have anything to do with those indictments?

A. No; Mr. Crawford.

Q. You sure?

A. As best I can recollect I had nothing to do with those indictments.

Mr. Crawford: Mr. Price—

The Witness: Oh. I beg pardon.

Mr. Crawford: —would you show that to the witness, please.

The Witness: I beg your pardon. Well, I will look at this first.

The Court: Is it marked?

The Clerk: Yes.

(Whereupon the Crier hands the document to the witness.)

The Witness: Yes.

By Mr. Crawford:

Q. You may read that if you wish, Mr. Lonergan.

A. That was—

Mr. Luckey: If the Court please—

Mr. Crawford: I mean, to yourself.

Mr. Luckey: —why don't you say so?

[fol. 365] The Witness: That's correct. That was—

By Mr. Crawford:

Q. Would you identify the signature on that exhibit?

A. Yes. That is my signature.

Mr. Crawford: Mr. Price, what is the number of that exhibit?

The Clerk: That is Defendants' 13, Mr. Crawford.

Mr. Crawford: Defendants' 13. Thank you, Mr. Clerk.

Q. That is your signature on the bottom of Defendants' 13?

A. That's correct.

Q. Now—

A. You didn't ask me whether I had anything to do with the proceeding subsequent to the indictment.

Q. I'm sorry, sir. I meant that.

A. I beg your pardon.

Q. When I spoke of the indictment I meant the various proceedings in connection with it.

A. (Witness nods head.)
Q. Now, you did have some—
A. Yes; Mr. Crawford.

Mr. Crawford: Yes. Now, may I have that, Mr. Price?

(Whereupon the Crier hands a document to Mr. Crawford.)

Mr. Crawford: Would you please show that to Mr. Luckey, Mr. Price?

[fol. 366] (Whereupon the Crier does as requested.)

By Mr. Crawford:

Q. Mr. Lonergan, did you in reply—speaking of the State indictment on wire-tapping charges of these defendants—did you in reply to their motion for a dismissal of the indictment urge that those indictments—that is, the wire-tapping indictments—be dismissed?
A. Yes; Mr. Crawford.
Q. You did that in Judge Lonergan's court?
A. Yes; Mr. Crawford.
Q. That would be on or about the 11th day of September, 1956, the day—the date that appears on Defendants' Exhibit 13?
A. I don't recall the date, Mr. Crawford. But, from the date that's on those papers it must have been somewhere close around there.
Q. Very near that?
A. Yes, sir.
Q. Now, what was your purpose in urging that the State indictment on wire tapping be dismissed?

Mr. Luckey: If the Court please, the testimony is that this was September 11, 1956, and the search and seizure is, according to the evidence, on May 17, 1956.
The Court: Is that a motion to dismiss?
Mr. Crawford: This is—pardon me, Your Honor.
[fol. 367] The Court: Yes.
Mr. Crawford: This is entitled "Reply to Motion of Defendants for Dismissal of Indictment" signed by Mr.—
The Court: Doesn't it speak for itself?

Mr. Crawford: I offer it in evidence.

Mr. Luckey: I would object to it, Your Honor, as being irrelevant because it's only a statement of counsel with reference to a transaction on September 11, 1956, long after the search and seizure.

The Court: All right. It will be received in connection with the defendants' theory.

(Whereupon a document entitled "Reply to Motion of Defendants for Dismissal of Indictment" previously marked for identification as Defendants' Exhibit 13 was received in evidence.)

By Mr. Crawford:

Q. Now, Mr. Lonergan, you did urge, then, in proceedings affecting the indictment of these defendants on State wire-tapping charges that the State indictment be dismissed for the reason that a Federal prosecution of these defendants would be facilitated; is that correct?

A. May I see that paper again? That's correct.

Q. You were served with a subpoena in this matter?

A. Yes; Mr. Crawford.

Q. And, you were asked to bring with you a copy of that [fol. 368] certain criminal complaint tendered to Claire Mundorff, United States Commissioner, by one Clyde Crosby on or about July 10, 1957, purporting to charge various persons with the violation of Title 47 U.S.C.A., Section 605? Do you have that with you?

A. I do not, sir.

Q. Where is it?

A. I have no idea.

* * * * * * *

[fol. 371] By Mr. Crawford:

Q. Now, Mr. Lonergan, adverting to the indictment which [fol. 372] we have referred to as the wire-tap indictments of these defendants in the State of Oregon, why did you urge that the indictments be dismissed?

A. For the reason that the Attorney General had wrongfully conceded that the evidence was seized illegally so as

to prevent a prosecution under the State indictments. And he had seen to it that the evidence in favor of the State was not submitted on behalf of the State. It was apparent immediately to me and to my superior that every effort was being made by the Attorney General to prevent a successful prosecution and that were a prosecution to be successful against these defendants it would have to be by the Federal Government and not by the State.

Q. Mr. Lonergan, if the raid of March 18, 1956—May 17, 1956, upon the premises of Raymond Clark was invalid and illegal so as to make the evidence secured thereby subject to suppression, the State wire-tapping indictments could never have been found or successfully prosecuted, could they?

A. The raid was not illegal, sir.

Q. Now, you just assume that.

A. I won't assume a fact that's contrary to the facts.

Q. Will you answer this question: Did the District Court for Multnomah County of the State of Oregon have jurisdiction to rule upon the validity of the affidavit of Mr. Langley in support of the search warrant?

A. I will answer that technically that the District Attor- [fol. 373] ney of Multnomah County had no jurisdiction whatever.

Q. Even though it issued the warrant?

A. The District Court issued no warrant.

Q. I see.

A. Do you want the distinction?

Q. And Judge Mears was acting, probably, in some other capacity?

A. That's correct.

Q. Yes.

A. He was acting as a magistrate.

Q. I see. Well, I will ask you another question. Did the Circuit Court of the State of Oregon have jurisdiction to hear and determine the validity of the search upon Ray Clark's premises on May 17, 1956?

A. I have grave doubts as to that, sir. I might add that it has never been definitely established in the State of Oregon that Oregon follows the Federal rule. There are cases in the Supreme Court to the contrary. And, under

the Constitution of Oregon it would be my opinion that it follows the common law rule and that Oregon is listed by the great commentators such as Wigmore—

Q. I am interested in what your thesis is but I do not believe you are answering my question.

The Court: You asked this witness if the Court had jurisdiction.

[fol. 374] Mr. Crawford: I just asked him—

The Court: And the only reason that this witness could give any thought about that was by reason of expressing his opinion as a lawyer. And, he may give the grounds for his opinion the same as any other expert witness.

You may continue.

Mr. Crawford: Very well. Proceed.

The Witness: I see. And, the great commentators on the subject such as Wigmore placed the State of Oregon in the common law rule states. And, the latest Oregon Law Review article on it says that the question is undetermined in the State of Oregon.

By Mr. Crawford:

Q. Well, what court in the State of Oregon has jurisdiction to decide whether or not a search made under a search warrant is or is not valid?

A. I should think an exact answer would be on that, that that would depend on the nature of the proceeding.

Q. What do you mean by that?

A. If a civil action is brought for trespass, then the court that has the civil action. If it is interpreting the issuance of a search warrant, then the magistrate issues the search warrant. If it is a criminal prosecution, the court that has the indictment or complaint before it. It depends on the nature of the proceeding.

Q. All right. Then, Judge Robert H. Mears issued the search warrant?

[fol. 375] A. That is correct.

Q. You will concede that?

A. (Witness nods head.)

Q. Was he not acting as the magistrate?

A. He was.

Q. Did he not have power to determine the validity of the affidavit upon which he issued the warrant?

A. Yes, he did.

Q. Then, does it not follow that he had jurisdiction to determine whether or not the search was valid?

A. To a limited extent. To the extent of determining whether or not the property seized under the search warrant—or, I should say by the search warrant should be returned to the person from whom it was seized or should be left in the custody of the State. As to property that was seized not by virtue of the search warrant but by virtue of the entry under the search warrant, as to that he had no authority whatsoever to determine its custody or possession.

Q. Well, I see. I see your point. Will you concede, Mr. Lonergan, that Judge Mears had the power to err?

A. Not only the power but the ability. You know, that doesn't answer the question as to jurisdiction of an inferior officer. His powers are usually only consistent with the statute. And, if he goes beyond the statute he is acting without his power, not merely erring in a determination of his power.

* * * * * * *

[fol. 376] Cross examination.

By Mr. Luckey:

Q. Mr. Lonergan, did you in connection with your official capacity ever have any understanding that Federal authorities would or would not prosecute this action?

A. None whatsoever.

Q. Before this seizure occurred was there any contemplation whatever that evidence would be obtained for the purpose of a Federal prosecution?

A. There was no thought of that whatsoever.

Q. To your knowledge was any evidence seized with a predesign that it was to be turned over to Federal authorities for prosecution?

A. No, sir.

* * * * * *

[fol. 378] RICHARD A. NOVAK, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name, sir?
A. Richard A. Novak, usually known as Dick Novak.
Q. Where do you reside, Mr. Novak?
A. 5701 Southwest Miles Court, Portland.
Q. How long have you lived in Portland?
A. Practically all my life.
Q. You're a native?
A. Yes.
Q. What is your occupation, sir?
A. I am a disk jockey, among other things.
Q. A disk jockey. You mean you're an employee of a radio station?
A. Yes; I am, for KPOJ Incorporated.
Q. KPOJ?
A. Yes.
Q. How long have you worked for KPOJ?
A. 25 months.
Q. How long?
A. 25 months.
Q. 25 months. Slightly over two years?
[fol. 379] A. Slightly over two years.
Q. Now, did you have occasion to go to the Multnomah County Courthouse on or about May 18, 1956?
A. Well, actually, sir, it was May 19th, because it was in the early morning hours of May 19th.
Q. How do you recall that date?
A. It was election—election night. We had finished a broadcast at the Journal and that's where I received my instructions.
Q. From whom?
A. From my superior, Dick Brown.
Q. Who is Dick Brown?
A. He is General Manager of Radio Station KPOJ.

Q. Say, do you know where Mr. Brown is?

A. Chicago.

Q. He is in Chicago?

A. He has the—

Q. How long has he been in Chicago?

A. About a week at the NARTB Meetings in Chicago. That's the National Association of Radio and Television Broadcasters.

Q. Oh. In other words, he is at a convention?

A. Well, I guess it's a convention.

Q. Now, where did you go to the courthouse on that day?

A. I went to the Sheriff's office.

Q. Can you narrow it down now? There are several Sheriff's offices.

[fol. 380] A. Multnomah County Sheriff.

Q. I mean, in that courthouse there are several suites of offices.

A. It was the—

Q. In what particular part of the building did you go?

A. It was on the main floor.

Q. On the main floor?

A. Sheriff Schrunk's office.

Q. Is that on the east side of the building on the 4th Street side?

A. Yes, it is.

Q. That was the private office of the Sheriff himself?

A. That's right.

Q. What did you do in that office, Mr. Novak?

A. I first of all set up my equipment. I brought—you neglected to ask if I brought any equipment.

Q. Did you take anything with you?

A. I think I had two recorders—I should say, playback and recorders. I am also a technician for KPOJ. And, I set them up for playback and record.

Q. Playback and record?

A. That's right.

Q. Now, I think I know what that is. But, for the record, please explain briefly what that operation consists of?

A. Well, I had—pardon me. I had one of our professional [fol. 381] machines which is known as a Magnecorder and that is what I used to record on. And, I had a home re-

corder which I set to "Playback" in order to play back the tape. And, as Mr. Charles Moore who testified yesterday attested, why, I set up a patch between the two whereby I could play back on one and record on the other.

Q. I see. Now, how many tapes did you see at that time?

A. Well, to the best of my knowledge I saw more than five. I think there were six, but I may be incorrect in this. I don't know.

Q. Is that your best recollection?

A. Well, I am judging this opinion on the fact that I spent the whole night at the Sheriff's office recording tapes. And, the general tape runs for approximately a half hour. And, I was there from approximately 2:30 until about 6:30, or 7:00, in the morning. So, judging from that I would say that there must have been around six tapes, or so.

Q. Mr. Novak, adverting to these recording machines that you had, aren't there some machines that you can take and record faster than others for the purposes of making copies?

A. I presume there are, but, unfortunately, we don't have those facilities at our organization.

Q. So, then, the machines that you used would be a machine that would run at the ordinary speed if you were to play the tape to listen to it; is that correct?

[fol. 382] A. That is correct, yes.

Q. Now, did you hear any of those tapes?

A. I heard them all.

Q. Did you hear what was on those tapes?

A. Yes, I did.

Q. Did you recognize any names on the tape?

A. Yes, I did.

Q. Do you recall those names?

A. I didn't recognize them. I had never heard them before, of course.

Q. Well, what names do you recall hearing?

A. I remember Mr. Tom Maloney. And, there were some abbreviated names.

Q. Such as what?

A. "The Kid."

Q. "The Kid"? What else?

A. Ricky. I think that's come out in previous testimony. I think Ricky was either one of Tom Maloney's sons or the other gentleman, Mr. McLaughlin.

Q. Mr. McLaughlin? Did you hear that name?

A. I think I heard Mr. McLaughlin. I can't be sure of it now. It's almost a year ago and I am reaching back in memory.

Q. Did you hear the name of Sheridan?

A. I don't recall whether I did or not, sir. I wouldn't know.

[fol. 383] Q. Did you hear the name of the Kid?

A. Yes, I did.

Q. Someone who was called the Kid?

A. Yes.

Q. How many copies did you make of those tapes?

A. I made a copy of each one.

Q. One copy of each tape?

A. That's correct, sir.

Q. You believe there were six tapes or five tapes?

A. I can't be sure. I think there were six, judging from the time. There may have been five, perhaps.

The tapes were made on a home recorder. And, on most home recorders they record in both directions. Now, if I may I would like to elaborate on this, if I might.

• • • • • • •

[fol. 384] Mr. Crawford: That relates to the manner of recording.

Q. Does that help you establish in your mind the number of copies or the number of tapes you saw?

A. I can't be sure of the number of reels of tape that I saw. As I said, I was judging purely on the time aspect.

Q. Then, this circumstance that you are about to relate would not throw light on the number of tapes there were?

A. Well, perhaps it would. As I started to explain, the tapes—

Q. All right. Go ahead.

A. —the tapes were recorded in both directions on a [fol. 385] home recorder. Now, on your professional equipment the machine records completely across the tape rather

than on just half of it and as a result the tape would have to be turned over and you would play the tape twice in both directions in order to get a complete recording from the original tape. This also necessitated changing reels on my own professional equipment, and so on.

So, judging from the time, as I said, it took approximately five hours, I would say that there were five or six tapes.

Q. What did you do with the copies of the tapes?

A. I gave them to Mr. Brad Williams, the reporter for the Journal.

Q. When did you give them to him?

A. When I finished recording them, sir.

Q. At about what time of the day in the morning was it?

A. You neglected to ask me. Mr. Williams and I went down to the office of the Sheriff together. He was there during the entire session.

Q. Oh. He was there during the entire time?

A. Yes, sir.

Q. Oh. I see. Did you take with you any of the tapes, the originals, when you left?

A. I took none of the tapes, no.

Q. Did you take any of the copies with you?

[fol. 386] A. No, sir; I did not.

Q. Do you know who took the copies?

A. The copies, as I said, went to Brad Williams, and that is—as far as I know he took the copies with him.

Q. Now, was anybody else present at that time?

A. Sheriff Schrunk was there. And, there was one other gentleman who I did not know.

Q. Did you ever hear his first name, or anything like that?

A. I think I was introduced to him, but I am notorious about meeting someone and forgetting their name in five minutes. I couldn't tell you who the man was.

Q. Could you describe him?

A. No, sir; I'm afraid not.

Q. Have you been here all the time?

A. Except for Mr. Langley's testimony the first part of this hearing, well, I have been here all the time, yes.

Q. Just except for that?

A. That's right, sir.

Q. Well, during the period of time that you were present in the courtroom did you see that individual in this courtroom?

A. I am afraid I wouldn't recognize him if I saw him again, sir. I don't know.

Q. Not that you recall?

A. Not that I recall, no.

[fol. 387] Q. How many reels of blank tape did you take with you, Mr. Novak, when you went down there to make those copies?

A. Well, to be frank with you I think I took everything we had up there. There must have been six or eight reels. I didn't record all the tapes. There were long spaces on some of them where no conversation was being held and I stopped the machine on instructions of Mr. Williams and run through until we heard some conversation and tried to record that. So, I think I had six or eight half-hour reels.

Q. You mean to say that on the original tapes on the 19th of May, 1956, that there were blank spots on those tapes?

A. No. There weren't blank spots, there was background noises and room noises and distant sound of noises and door closing, and things of that nature. I think Mr. Sherk brought that out earlier.

Q. Yes.

A. But, the conversation was so subdued that it was practically unintelligible.

Q. I see. That part you did not put on the copies?

A. That's right, sir. I recorded part of it until I was instructed not to.

Q. By Mr. Brad Williams?

A. That's right, sir.

* * * * * * *

[fol. 389] VAYNE GURDANE, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Mr. Price, would you please ask the Clerk for the Photostat of the admission record?

(Whereupon the Crier does as requested.)

Mr. Crawford: Mr. Price, would you please hand Exhibit 11 and 11-A to the witness, please?

(Whereupon the Crier does as requested.)

By Mr. Crawford:

Q. Mr. Gurdane, the first page of the two pages is Exhibit 11 and the second page is Exhibit 11-A. On the first page, Exhibit 11, do you see your name?

A. Yes, sir.

Q. Did you sign your name on that page?

A. Yes, sir.

Q. And, will you look on the second page; that is, 11-A. Do you find your name on that page?

A. Yes, sir.

Q. Now, what was the occasion of signing your name in the first place?

A. On the first one after these tapes were turned over to us, our Superintendent, Mr. Maison, directed that after we had—after Mr. Cross, Lieutenant Cross, had packed [fol. 390] them back and forth several nights, to get a safety deposit vault to put them in. Now, Cross was in charge of the tapes and as the entries here show he went and got them all the time, but in case—in case—

Q. At that point—

Q. —in case he was not available there was a second party to sign. That is the reason my signature shows there.

Q. Now, on the first page your signature appears. I believe it is called a signatory, is that correct?

A. I don't know what the proper name is for it.

Q. Well, it indicates that you are a person authorized to enter that box?

A. That's correct.

Q. Yes. At that time you signed your name did you secure a key to the box?

A. To be real honest with you I had the key before I signed my name. This was right during the probe and they gave Cross two keys and then I went down and filled this card out a day or so afterwards.

Q. In other words, he signed the card?

A. He signed for the box.

Q. Yes.

A. I should have went, probably, with him but I wasn't available for a day or so.

Now, I am not just positive when I got the key but I [fol. 391] think I got the key the first day. But I wouldn't be positive in that regard. I might have got it when I signed the card.

Q. Is there any indication on that card as to when you signed it?

A. No, there isn't, that I can see. I can't notice if there is anything.

Q. Well, let me put it this way, then. I know that Claude Cross' name appears on there above your name.

A. Uh huh.

Q. But, was his signature made on that card before you made yours?

A. That's right.

Q. Yes. Now, taking the period of time between the first date that appears on that slip, now, when does it appear that the box was rented? Would you read that date into evidence?

A. Well, the first time that the box was—June 4, '56.

Q. June. Now, are you reading the date of the first entry into the box or are you reading the date—

A. Well, I think that—I wouldn't be positive when was the first date we rented the box. I couldn't tell you. I am just going by their date.

Mr. Crawford: Well, I would like to look at that exhibit, Mr. Price.

(Whereupon the Crier hands the document to Mr. Craw-[fol. 392] ford.)

Mr. Crawford: May I read the date into the record?

The Court: Yes, you may.

Mr. Crawford: Let the record show that it appears from this record of the bank, the Defendants' Exhibit Number 11, that the first date of the entry into the box was June 4, 1956, at 10:05 A.M. by Clyde Cross—Claude Cross.

Q. Now, you stated a moment ago—it is Captain Gurdane, isn't it?

A. That's right.

Q. That is your title?

A. Yes.

Q. Captain, the tapes were under the control of Claude Cross?

A. Designated by the Department, yes. I might add this—

Q. You mean officially they were under his control?

A. Well, it was under a dual control, you might say. Claude Cross at that time was assigned to what we termed the probe. I was in charge of the probe, Cross was working under me. I directed Cross to take care of the tapes.

Q. That is, he was charged, then, with the actual physical custody of the tapes?

A. Well, in a sense. If we brought the tapes out, why, I would, no doubt, send Cross down to get them, naturally. [fol. 393] And if they was going to be played or checked in in any way, why, Cross would be the man to do it, not me.

Q. In other words, he either kept them in the vault—

A. He is a technician, I am not.

Q. —he would keep them in the vault or he would keep them in his presence?

A. Or bring them down to our offices.

Q. Yes. Did you at any time between June 4, 1956, which is the date of the first entry of that box, and September 5, 1956, did you yourself—I mean, September 5th, immediately before the search under the search warrant?

A. You mean prior?
Q. Before the time of it, yes. Prior to that.
A. Prior to September 5th?
Q. Yes. Did you take those tapes out of the box yourself?
A. No, at no time.
Q. At no time.

Mr. Crawford: That's all. Wait. You may inquire.

Cross examination.

By Mr. Luckey:

Q. Captain Gurdane, when was the first time you had any inquiry about any Federal officials with reference to these tapes?
A. I didn't make any record of the date. But, it was just prior to us moving back to our own building from the Liquor Commission building and we moved back to the [fol. 394] Liquor Commission building on the 1st of August. So it must have been one of the last few days in July.

Mr. Luckey: Thank you very much.

Redirect examination.

By Mr. Crawford:

Q. Of what year, Mr. Gurdane?
A. '56.
Q. And, who made that inquiry?
A. U. S. Attorney Luckey.
Q. Mr. Luckey.
A. Uh huh. By telephone.
Q. What did Mr. Luckey say?
A. He just asked if—if we still had the tapes in our custody, if we were using them, and just along that line: I couldn't remember the exact language. It wasn't a very lengthy conversation.
Q. He just wanted to ascertain whether or not—
A. We still had them.

Q. By "we," who do you mean?

A. Oregon State Police.

Q. Were you holding them for the Attorney General of the State of Oregon?

A. That's right.

Q. Who was in charge of this—you have used the word "probe." You mean the investigation of vice conditions [fol. 395] pursuant to a directive of the Governor of the State of Oregon?

A. That's right, Mr. Crawford.

* * * * * * *

[fol. 396] GEORGE MINIELLY, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

* * * * * * *

Q. State your full name?

A. George Edward Minielly.

[fol. 397] Q. Where do you live, Mr. Minielly?

A. Portland, Oregon.

Q. What is the nature of your employment?

A. I am deputy sheriff, Multnomah County, State of Oregon.

Q. How long have you been a deputy sheriff of Multnomah County?

A. Twenty-seven years.

Q. And you were during all of the year 1956 a deputy sheriff of Multnomah County?

A. Yes, sir.

Q. On active duty?

A. Yes, sir.

Q. You are now?

A. Yes, sir.

Q. Who was your superior during 1956? Who was Sheriff?

A. Sheriff Terry D. Schrunk.

Q. On May 17, 1956, were you called upon by the Sheriff to execute a search warrant upon the premises of Raymond Clark at 2409 Southwest Main Street, Portland, Oregon?

A. Yes, sir.

Q. Southeast Main Street. Pardon me.

A. Yes, sir.

Q. Did you so execute the warrant?

A. Yes, sir.

Q. In executing the warrant, Mr. Minielly, were you [fol. 398] able to gain access to the premises of Mr. Clark without force?

A. No, sir.

Q. What did you do to accomplish access?

A. Forced the front door.

Q. How did you force it?

A. By sheer power, butting in the door with my shoulder with the assistance of another officer.

Q. That is, you were refused admission to the premises but you did go in by means of striking the door with your shoulder and going through in that manner, is that correct?

A. Yes, sir. That's correct.

Q. Now, who was the other officer that helped you in that admission?

A. Arthur Heem.

Q. Arthur Heem?

A. H-e-e-m (spelling).

Q. H double e-m (spelling)?

A. (Witness nods head.)

Q. Now, when you went in the premises, Mr. Minielly, what did you do after you first went in the premises?

A. There were two women present.

Q. Who were they, if you know?

A. I didn't know.

Q. Do you know now?

A. I know now.

[fol. 399] Q. Who are they?

A. Mrs. Clark.

Q. Is that the wife of Mr. Clark?

A. Yes, sir.

Q. All right.

A. And, a woman identified as Sonny Martin.

Q. Were any other persons present at that time—

A. No, sir.

Q. —in the house?

A. No, sir.

Q. Of course, exclusive of the officers, and your answer is Yes? I mean, No, there were no other persons present?

A. Just the two women were present.

Q. Just the two women. Yes. Now, was an attempt made to enter the rear of the premises?

A. Yes, sir. I detailed two uniformed officers to the rear door and they received the same answer as I did.

Q. All right. Now, what were the names of the two uniformed officers?

A. Sergeant Garth Stackhouse and Hal Lynn.

Q. Now, did any other person accompany you into the premises other than the officers?

A. Yes, sir.

Q. Who were they?

A. They were newspaper men.

[fol. 400] Q. What were their names? I am talking about the initial entrance.

A. Yes, sir. I didn't know two of them at the time but I do know now who they were. They were Brad Williams, Doug Baker.

Q. Now, what newspaper are—by—

A. Journal.

Q. What newspaper are they employed with? The Journal of Portland, Oregon?

A. The Oregon Journal of Portland, Oregon. And a little Oriental cameraman. I believe his name was Lee.

Q. Is he also employed by the Journal?

A. Yes, sir. I believe so.

Q. Now, did these newspaper men arrive at the premises at the same time that the officers arrived?

A. I don't know whether or how they arrived but they were there because when I approached the house they were following us.

Q. In approaching the premises and in making your entrance into the premises they were right with you; that is, at least by your side or behind you?

A. They were a few steps behind.

Q. Yes. Do you know, Mr. Minielly, how those reporters happened to be present?

A. I do not know.

[fol. 401] Q. Did you ever inquire how they happened to be present?

A. No.

Q. I mean, not only from the newspaper reporters but from other concerns?

A. No.

Q. Did you make any attempt to ascertain how they knew that a search was going to be made?

A. No.

Q. Now, you went into the premises. Now, briefly, Mr. Minielly, those were what you would call living premises, were they not?

A. Right.

Q. That is the usual furniture that a home contains?

A. Correct.

Q. And, it could safely be described as a dwelling house for people to live in?

A. Yes, sir.

Q. Now, when you first arrived Mr. Clark was not at home, was he?

A. That is correct.

Q. How soon after Mr. Clark arrived—no. How soon after you first gained access to the premises did Mr. Clark arrive?

A. I would say between 15 and 20 minutes.

Q. All right. Now, after you gained access to the premises did you commence to search the premises?

[fol. 402] A. After I advised the occupants which I had already done on the front porch before I forced the door, I had advised the woman that came to the door and peeked through the Venetian blinds who I later identified as Mrs. Clark, I showed her my badge and I told her we were sheriff's officers and I was armed with a legal search warrant signed by District Court Judge John Mears and I requested of her to read the search warrant which she did and I held it up to the window.

Q. At least, you held it in a position where she could have read it if she wanted to do so?

A. Well, she stayed there some four or five minutes. I would say I assumed she was reading it because I held it up right to the window and her eyes, I would say, were four or five inches from the window which would be a reading distance. And she still refused admission and said that I would have to wait till her husband came home which would be some 15 or 20 minutes, she said.

Q. Now, just what articles were you looking for pursuant to the search warrant, Mr. Minielly?

A. Well, I haven't seen that search warrant since that day. My recollection is that it was for pornographic pictures, film, and recordings.

Q. Very well.

May I have the document?

[fol. 403] (Whereupon the Crier hands a document to Mr. Crawford.)

Mr. Crawford: No. This is the search warrant.

The Clerk: I believe you have that, Mr. Crawford.

Mr. Crawford: May I look at the original motion to suppress? We believe it is Exhibit Number 5.

Mr. Price, now, would you please hand that paper to the witness?

(Whereupon the Crier handed the document to the witness.)

By Mr. Crawford:

Q. I hand you what is, I believe, called Defendants' 5 entitled an "Affidavit for a search warrant," is that correct, Mr. Minielly?

A. This is an affidavit, yes, sir.

Q. Now, will you kindly read that to yourself? It is short.

A. Yes, sir.

Q. Now, will you note there that the affidavit avers that there is on the premises of Raymond Clark at that address certain obscene pictures with accompanying sound recordings. Do you note that?

A. I note that. But, this is the first time I have ever seen this document.

Q. Well, you do note that now?

A. Yes. I note it now.

[fol. 404] Q. Yes. Now, turn to the search warrant, please, which is the next document marked Defendants' Exhibit 4. Now, what does that say in regard to obscene photographs, directing you to search for what?

A. For obscene photographs and sound recordings.

Q. Yes. Now, did you look for obscene photographs?

A. Yes, sir.

Q. Did you find any?

A. No, sir.

Q. Now, how long did you look for obscene photographs?

A. Well, we were on the premises approximately two hours.

Q. Did you ever find any obscene photographs?

A. No, sir.

Q. Did you spend some time looking for obscene photographs?

A. Among other things which we found.

Q. Now, you found some tapes and sound recordings on the premises, did you not?

A. Yes, sir.

Q. Now, in regard to the tapes, where did you find the tapes?

A. In a hassock.

Q. All right, Mr. Minielly. Where was Mrs. Clark sitting in the room at the time that you searched the hassock?

A. As I recall, about three feet from the hassock.

Q. She was in a chair?

[fol. 405] A. Yes, sir.

Q. Was Sonny Martin sitting in a chair on the other side of the hassock?

A. As I recall, yes.

Q. In other words, they were right close to it?

A. Yes, sir.

Q. One on one side and one on the other?

A. I believe that's correct.

Q. Now, on top of the hassock—what was on top of the hassock?

A. A lid.

Q. What was on the lid?

A. Well, as I recall it was a red leather flower or decoration or lid.

Q. With a wooden top on it?

A. Well, I don't recall whether—

Q. Were there coffee cups on the lid?

A. I don't recall.

Q. You don't recall that at all?

A. No.

Q. Just before searching the hassock did you say to one of the newspaper reporters who was present at that time, pointing to another object in the room, "Is that a hassock?"

A. No, I don't recall that. I know a hassock when I see it.

Q. You didn't say that?

[fol. 406] A. No, I don't recall any conversation like that.

Q. Did the newspaper reporter tell you then, pointing to the hassock, "No. That is a hassock."?

A. I don't recall any of that either.

Q. You just don't recall it?

A. No, sir.

Q. Did it look like a hassock?

A. Well, my opinion a hassock is a large leather or imitation-leather stuffed object that is used to either sit on or rest your feet on while you are lounging in a large chair. And that's what this object was, in my opinion.

Q. At that time, though, it was being used as a coffee table, wasn't it?

A. I didn't see any coffee cups that I recall, Mr. Crawford, and I so answered.

Q. Who lifted the top off the hassock?

A. As I recall, I did.

Q. You or Brad Williams?

A. No. Brad Williams didn't.

Q. Did Doug Baker?

A. No, sir.

Q. You're sure about that?

A. As I recall, I lifted the lid off the hassock.

Q. All right. So, you say, then, you lifted the lid off the hassock?

A. Yes.

[fol. 407] Q. Did you look inside the hassock?

A. I did.

Q. What did you see in the hassock?

A. There were five small cardboard boxes about five-and-a-half by five-and-a-half inches, about a half-inch thick or three-quarters, stacked one on top of the other in the bottom of this hassock.

Q. Now, was anything else in the hassock?

A. Not that I recall.

Q. Just those five boxes?

A. Yes, sir.

Q. You are sure there were only five?

A. Yes, sir.

Q. Now, you have been in the courtroom all of the time during the taking of this testimony, have you not, Mr. Minielly?

A. Yes, sir.

Q. Did you hear the testimony of the witness Sherk?

A. Yes, sir.

Q. Do you recall that he testified on May 22, 1956, that you made available to him five reels of tape in boxes? Do you recall him so testifying?

A. I heard that testimony, yes.

Q. Yes. Did you recall the testimony of Mr. Howlett and of the witness Jack Buell?

A. I did.

[fol. 408] Q. Did you hear Mr. Buell testify that at the time that Mr. Sherk testified he was looking at five reels of tape in the Sheriff's office that at that same time Mr. Buell was untwisting another reel of tape in the District Attorney's office?

A. That is correct.

Q. Now, you only got five reels of tape out of the hassock?

A. That is correct. I may clarify that for you if you would like for me to.

Q. Yes. I want to know where this sixth one came from.

A. There wasn't any sixth roll of tape. There was five. And what Mr. Sherk failed to remember or did not know was that one of those boxes did not contain a roll of tape, it merely contained a couple of small pieces of paper.

The tape was up on the floor of the District Attorney's office in a mass of tangle and being worked on to get it back on the reel.

Q. How did it get tangled?

A. I dropped it and the core of the tape came out of the tape itself, plastic, and went into a million tangles of grapevine—like a fishline would when you cast and she backlashes on you.

Q. Then, Mr. Sherk didn't see five reels of tape at the time that he so testified that he did?

A. No. He saw the fifth box. It did not contain a reel [fol. 409] of tape. I brought the box down.

Q. Now, when you saw this tape in the hassock, tell the Court just what you could see at that time?

A. I saw five boxes which I removed and raised the lid on each box.

Q. On each box?

A. Yes.

Q. On each box?

A. Yes. That's right.

Q. All right. Proceed.

A. Which in my opinion had information which was contained on the tapes.

Q. Did you play the tapes at that time?

A. No, sir.

Q. Did you hold the tapes up to the light and could you see anything on the tapes?

A. No, sir.

Q. It is manifestly impossible to determine from the tapes whether they contained anything, wasn't it?

A. That's right.

Q. Without playing them?

A. That's right.

Q. Now, where did you get your information that this contained—what did you say you thought the tapes contained? I didn't get that. I don't remember it if you did [fol. 410] say it.

A. I stated that there was two to three, as I recall, pieces of paper like note paper with a synopsis of what was contained on each tape, the names of individuals.

Q. Are those what has been referred to as notes?

A. Yes, sir.

Q. Was there anything on the notes that indicated that they were telephone conversations?

A. I don't recall anything about telephone wording on the notes.

Q. Was there—

A. I don't recall. I don't believe there was.

Q. Not a thing?

A. No.

Q. All right. So, from the notes themselves you could not tell if there was any telephone conversation on the notes, is that correct?

A. That's correct.

Q. From the tapes themselves you could not tell whether there was any telephone conversation on the tapes?

A. That's correct.

Q. When you picked up these tapes did you believe that these tapes were—contained recordings which would accompany pictures—obscene pictures?

A. No.

Q. What did you think they contained?

[fol. 411] A. Well, once again we get back to the press. I had read in the press regarding tapes, telephone conversations, listing names of individuals and from the notes I found in the boxes, in my opinion, these were the tapes that the newspapers had been referring to.

* * * * * * *

Q. This hassock, now, Mr. Minielly, what color was it?

A. Oh, as I recall, it was ivory or a light yellow with a red decoration on the lid.

Q. You lifted the lid off?

A. As I recall, I lifted the lid off.

Q. At that time you saw some boxes?

A. That's correct.

Q. And you say you opened each one of the boxes?

A. I did.

Q. Did you find a note in the boxes?

A. As I recall, I found a note in each box.

Q. On these notes it gave no reference to telephonic conversations?

[fol. 412] A. I don't recall the word "telephone" or "telephonic" on the notes.

Q. Did it say anything about radio communications on it?

A. No, sir; I don't recall that.

Q. Nor, telephone communications?

A. No, sir.

Q. How did you happen to look in that hassock?

A. Well, that's hard to say. On a search you're just looking. You look behind objects, under rugs, behind pictures, under debris, beds, and whatnot. It all depends.

Q. Did you have any special reason for looking in the hassock?

A. No; other than curiosity.

Q. Were you searching through curiosity or to find evidence of a crime?

A. I was naturally searching for evidence, but—

Q. You were looking primarily, of course, for obscene pictures?

A. Obscene pictures and records which we found two dozen of.

Q. Records?

A. Phonograph records.

Q. Did you take all the phonograph records in the house?

A. No, sir. There was thousands of them. There was two albums which Mr. Clark identified as his party records.

[fol. 413] Q. Now, can you state any reason at this time why you looked in the hassock other than for curiosity?

A. As I recall, one of—I think it was Doug Baker said, "Did you look in that hassock?"

Q. He called your attention to the hassock?

A. He asked me I had looked into it and I said—

Q. Then, what did you say?

A. I said, "No. I haven't looked into it."

Q. Did you point to another object and say, "Is that a hassock?"

A. No, I don't recall that at all. I know a hassock when I see one.

Q. Did he point out this particular hassock to you?

A. I was standing within about three feet of it.

Q. Did he point it out to you?

A. No, I don't know as he pointed it out. He said, "Did you look in that hassock?" It was a very large hassock.

Q. Indicating the hassock when he said that?

A. Yes, sir.

Q. Do you recall your testimony in Judge Mears' court on May 22, 1956, and do you recall this question that was put to you, and this answer that you made, by Mr. Raymond "Q. How did you happen to look in the hassock for this? A. That's my business."

Now, do you wish to elaborate on that answer?

[fol. 414] A. Well, I apologize. I apologize for that remark. I was a little bit hot, the way they were asking the questions and indicating I had previous information or had been in the house before, or something like that, which I never had.

And, I didn't mean to be hasty in making that remark to Mr. Raymond. But, I do recall it, yes.

Q. Your explanation of that remark is that it was an unfortunate remark?

A. That's right.

Q. Now, what did you do with these tapes after you saw them?

A. I removed them from the hassock.

Q. Did you take them into your own personal possession?

A. I did.

Q. Now, at that time you had not played the tapes?

A. No, sir.

Q. You had, of course, no idea of your own knowledge what was on the tapes?

A. No, sir.

Q. They could have been blank tapes for all you knew?

A. That's correct.

Q. Did you make a remark at that time, Mr. Minielly, concerning the tapes?

A. I could have but I don't recall what I said, if anything.

[fol. 415] Q. Did you say "This is what I am looking for"?

A. I don't recall any such remark.

Q. Did you make it?

A. Not that I recall, no. I don't recall making any such remark.

Q. What did you then do after you had the tapes in your hands?

A. As I recall, I took them to the basement with me and set them on a bench down there where I could be alone or not be bothered by persons to examine the contents of the boxes.

Q. How long did you leave them on this bench in the basement?

A. I was down there, possibly, five minutes.

Q. How long did it take to go down to the basement and come back up again?

A. Oh, approximately five, six, seven minutes.

Q. How long?

A. I said five or six or seven minutes.

Q. And, then, what did you do, come back up to the upper—

A. I come back upstairs and I think then in a few minutes I decided to lock the tapes up in my car which I had parked out in front of the door. They were too large to put in my pockets and I could see from the people present that they all seemed to want to get their hands on them and [fol. 416] examine them which I wouldn't allow. And the only way I could keep possession and not be molested would be to lock them up.

Q. Mr. Minielly, you say you took the tapes out of the hassock and then you went down in the basement with them and placed them on a bench?

A. Where I could examine them.

Q. Seven or eight minutes later you came back up to the front room, I presume?

A. That's to the best of my recollection.

Q. Now, I want to ask you this question: The premises had a back door and a front door, is that correct?

A. Right.

Q. Did you ever go out the back door?

A. No, sir.

Q. You always went in and out the front door?

A. That is correct.

Q. All right. As a matter of fact, Mr. Minielly, upon getting manual possession of the tapes; that is, the first time they were in your hands, you immediately ran out of the front door, didn't you?

A. No, I did not.

Q. Didn't you go immediately out of the front door and ostensibly put them in your car?

A. No, I did not. I remember very distinctly of being [fol. 417] in the basement examining them and left them on the bench there for about 30 seconds while I took a look at those stacks that were back there in the back room and was going to count them and they were stacked in such a manner it was quite a job to count them the way they were stacked until some of them were removed. Then I went back and took the tapes and went out to the car, as I recall it. I didn't run any place.

Q. Do you recall your testimony in Judge Mears' court?

A. I don't recall it word-for-word. I don't have a transcript of it.

Q. All right. I will refresh your memory. Did you give these answers in reply to these questions at that time:

"By Mr. Raymond:

"Q. Mr. Minielly, referring to Identification Exhibit Number 11?

"A. Those are the five boxes I found in the hassock.

"Q. Were they wrapped like this?

"A. I put the rubber band on.

"Q. Otherwise they were loose in the hassock?

"A. That's right.

"Q. What did you do with them after that?

"A. I removed them to my car and locked the car securely."

Now, did you at any place in your testimony in the hearing on the motion to suppress ever say that instead of

going out and locking them in your car that you took them down in the basement?

A. I may not have told them about going to the basement to examine them. He didn't ask me.

[fol. 418] But, they eventually ended up in my car about 15 minutes after I found them.

Q. Well, now, they ended up in your car about 15 minutes after you found them?

A. Could be three or four minutes one way or the other.

Q. Now, who took the tapes to the courthouse?

A. I did.

Q. What did you do with the tapes?

A. I kept them in my possession at all times until I turned them over to Sheriff Schrunk.

Q. Where was that in the courthouse?

A. In his private office.

Q. Do you recall at the same hearing these questions and these answers:

"Q. And then did you drive them"—meaning the tapes —"to the courthouse?

"A. I didn't drive any place. I came right back in the house.

"Q. I don't mean—ultimately you drove them to the courthouse?

"A. Yes.

"Q. Where did you put them in the courthouse?

"A. I put them in the custody of Sheriff Schrunk and locked up in his safe.

"Q. Did you play them before you put them in his custody?

"A. I didn't play them. I went home and went to bed.

"Q. Have you at any time played them?

"A. No, sir."

A. I still stand by that answer. I have never played them. I have heard them played but I don't play them. I don't know how to operate one of those machines.

[fol. 419] Q. You heard them played that night, didn't you?

A. A few minutes when I returned about 3:00 o'clock in the morning. I did go home after I had given him the

tapes. And as far as—in my presence as I recall he locked them up in his safe, I went home and went to bed. About 3:00 o'clock or maybe 3:15, I don't know the exact time, I got a telephone call which awakened me and Schrunk asked me if I had a list that had been found in the Clark residence of all the deputy sheriffs, their residences and the shift and what precinct they worked out of, and I said, "I do. Yes. I have. I forgot to leave that." He says, "Will you return it now?" I says—he says, "I wish you'd bring it down now. I hate to—" "O.K." I get dressed and I returned to the courthouse, I knock on his door, I am admitted, I stay there maybe 10, 12, 15 minutes, the tapes are being played, there is several men there, I go back home and go to bed.

Q. You didn't want to convey the impression to the Court at that time that you never heard the tapes played, or anything like that?

A. No.

Q. You were just strictly speaking technically you never played them?

A. That's right.

Q. Yes. At that time had you made them available to Mr. Sherk of the F.B.I. to play them?

[fol. 420] A. That was the next week.

Q. When?

A. About Tuesday of the next week.

Q. But at the time that you gave your testimony in the District Court it wasn't the next week, was it? That was on the very same day that you made them available to Mr. Sherk, didn't you?

A. What—

Q. May 22, 1956, George?

A. That's correct. That's correct. That's what I said, the next week. I am talking about the night—I thought you was back on the same night of the raid.

Q. The question was, have you at any time played them and your answer was "No"?

A. That's right.

Q. Did you hear Mr. Sherk's testimony while you were in the courtroom?

A. That's correct.

Q. Did you hear Mr. Sherk testify that you placed that reel on the machine in preparation for playing?

A. With his assistance. I furnished the machine and furnished the boxes of tape recordings, four of them, and the fifth emptied box and I don't believe Mr. Sherk ever knew that fifth box was empty. If he did—

Q. Well, I am going to find out.

A. And, if he did he didn't recall it. But—

[fol. 421] Q. Why, have you talked with Mr. Sherk?

A. No, I haven't talked to Mr. Sherk.

Q. Have you talked with any member of the U. S. Attorney's office concerning that point?

A. No, sir.

Q. Mr. Santoiana?

A. No, sir.

Q. How do you know, then, that Mr. Sherk doesn't recall it?

A. I heard his testimony.

Q. Now, Mr. Minielly, on May the 22nd, 1956, you had at least four tapes in your possession, did you not?

A. Yes, sir.

Q. And a Minifon?

A. I don't recall the Minifon. As I recall, the Minifon was in the possession of Sheriff Schrunk in his main office. I never did.

Q. It wasn't in the room that Mr. Sherk—

A. Mr. Sherk had seen the Minifon in Schrunk's office.

Q. He didn't see it in the room?

A. Well, if he did I don't recall it. But, it could have been there. But, at the moment I don't recall having the Minifon.

Q. It was five tapes you seized, is that correct?

A. It was five tapes I seized.

[fol. 422] Mr. Crawford: Mr. Price, please, will you hand the witness Defendants' Exhibit Number 2 for identification and show it to him?

(Whereupon the Crier does as requested.)

By Mr. Crawford:

Q. Mr. Minielly—

A. Yes, sir, this is—

Q. —would you please identify that document?

A. Yes, sir. This is a copy.

Q. What kind of a copy?

A. Of the receipt for articles.

Q. What kind of copy, Mr. Minielly?

A. A photostatic copy.

. . . . . .

Q. Just tell us what it is?

A. This is a photostatic copy of the receipt given to Mr. Clark the night of the raid which I will explain if you will allow me to.

Q. Well, not at this time. I am going to give you an opportunity to.

[fol. 423] A. All right.

Q. In other words, that is the receipt you gave Ray Clark at his home for the articles seized pursuant to the State search warrant, is it not?

A. Yes, sir.

. . . . . .

By Mr. Luckey:

Q. What did you do with the original of which this is a copy, Mr. Minielly?

A. That was returned—made a return.

Q. To whom?

A. To the Clerk's office and the Judge, Judge Mears.

Q. The original receipt. Did you give a receipt to Mr. Clark?

A. Oh, yes; the original.

Q. The original of this document (indicating)?

A. Yes.

Q. And you don't have the original yourself or don't [fol. 424] know where it is?

A. No.

. . . . . .

[fol. 425] The Court: Can you represent to the Court, Mr. Crawford, who made the photostat? Do you know?

Mr. Crawford: It was made—just a moment. I think I can clear that up.

It was made in the office of the County Clerk of Multnomah County.

Q. Mr. Minielly, that is your signature which appears on that document?

A. Yes, sir.

Q. And did you sign that document?

A. Yes, sir.

Q. Terry D. Schrunk, Sheriff, by George E. Minielly?

A. Yes, sir.

Q. Are you satisfied that that is a true and correct copy of the receipt that you gave Ray Clark on May 17, 1956, pursuant to the search warrant?

A. I believe so, yes, sir.

The Court: Is it in your handwriting?

The Witness: The signature only is in the handwriting. Another deputy made out this list and that's what I want to explain if you will let me.

By Mr. Crawford:

Q. That is, the handwriting listing the articles was made, [fol. 426] I think, by Deputy Sheriff Stackhouse?

A. Hal Lynn.

Q. But before you signed the document you looked at the document, did you not?

A. I erred. I hastily looked at it and left out the five boxes of tape.

Q. There was a correction made on the document, wasn't there?

A. Yes. He had tape here for one wire and several other numerical errors. And they were scratched out with quite a bit of confusion going on there and stuff stacked on the table and I hastily signed this before adding the five boxes of tape recordings which I had removed to my car and later explained that to the other—

The Court: Well, let's just get—

By Mr. Crawford:

Q. This just goes, George, to the identification of the document.

A. Yes.

Q. This is a photographic copy of it?

A. That's right.

Q. Of the receipt you gave Ray Clark at his home on May 17, 1956, pursuant to the search warrant?

A. That is right.

. . . . . .

[fol. 427] By Mr. Crawford:

Q. Mr. Minielly, when did you put your initials on the boxes which contained these tapes?

A. Shortly after I came in possession of them.

Q. Where?

A. In the Clark residence.

Q. In the Clark residence?

A. Yes.

Q. You initialed them in the Clark residence?

A. In the basement when I examined them I initialed each box.

Q. You are sure of that?

A. That's what I recall, yes, sir.

Q. Now, please search your memory. I want you to testify directly and positively, Mr. Minielly. Where did you put your initials on the tapes?

[fol. 428] A. Well, as I recall, I initialed them then. I always try to be very careful in evidence that I initial it so I can identify it.

Q. Now, are you sure that you found the tapes in the hassock, went down in the basement and then took them out to the car?

A. Yeah. I took them out to the car after—

Q. No. You found the tapes in the hassock, took them down to the basement and then out to the car?

A. That's right.

Q. Where did you find the Minifon?

A. In the basement.

Q. Before or after you found the tapes?

A. As I recall, I believe it was shortly after I found the tapes at the foot of the stairs of the basement. There was a pile of newspapers, debris, and I found the Minifon there and also a couple of sacks containing what I thought was telephone equipment.

Q. Where did you find the spools of wire?

A. The other boys, I believe, uncovered the spools of wire there.

Mr. Crawford: Give me that Defendants' Exhibit 2. That is that receipt that Mr. Minielly gave Mr. Clark.

(Whereupon the Crier hands the document requested by Mr. Crawford to him.)

[fol. 429] By Mr. Crawford:

Q. Where did you find 31 spools of wire recording in four boxes?

A. As I recall it, the other boys found the spools of wire. I didn't find them.

Q. You took that many spools of wire, though, didn't you?

A. Yeah. I believe there was that amount.

Q. Yes. You took one payroll book, did you not?

A. I believe so.

Q. Yes. That had nothing to do with the articles that you were searching for, did it?

A. No, not that I recall.

Q. Did it contain any obscene pictures or sound recordings?

A. No, sir.

Q. Now, one Kodascope 8 Model 70 projector, why did you take that projector?

A. Well, in my opinion I thought that went along with projecting film or negatives, and so forth.

Q. Did you see it being used in the process of exhibiting any film or negatives?

A. No, sir.

Q. Did you see it in the process of doing anything which would constitute any illegal use under any City, County, or Federal law?

A. No, sir.

Q. If you saw the same thing in the storeroom of a window would you think that it was being put to an illegal use?
[fol. 430] A. No, sir.

Q. All right. Now, there were three reels of Castle children's film? Why did you take that?

A. It was film. I didn't know what was on the film.

Q. Did it appear that the possession of that film indicated that any law was being violated?

A. No.

Q. Now, there was two short lengths of wire. Why did you take two short lengths of wire?

A. That was amongst the equipment of telephone receivers and adapters and whatnot there that I thought that might—could have been used in wire tapping.

Q. Did you see any evidence at the time of the search and seizure that it was being used in the violation of any crime whatsoever?

A. No, sir.

Q. N let's get back to these tapes. How many did you take?

A. Five.

Q. In whose custody were they after you took them?

A. Sheriff Schrunk.

Q. Now, were you present at the time those spools of tape, a Minifon recorder, and three spools of Minifon wire were turned over to Mr. Thornton, the Attorney General?

A. Yes, sir.

Q. Was Mr. Clyde Crosby present at that time?
[fol. 431] A. Yes, sir.

Q. Those articles which I have mentioned, the five spools of tape, the Minifon recorder, and the three spools of Minifon recording wire, were all taken from the home and residence of Ray Clark at 2409 Southwest Main Street, Portland, Oregon, on May 17, 1956?

A. Yes, sir.

Q. That was pursuant to the search warrant that we have been speaking of here?

A. Yes, sir.

Q. And is Mr. Clark the defendant who is sitting behind me in this courtroom (indicating)?

A. Yes, sir.

Q. And, he is the defendant in this proceeding?
A. Yes, sir.

Mr. Crawford: I have no further questions.
The Court: Cross-examine?

Cross examination.

By Mr. Luckey:

Q. Mr. Minielly, before this raid did you confer with any Federal official concerning the raid in any way?
A. No, sir.
Q. To your knowledge did any Federal official have any knowledge that it was going to be accomplished or anything about it?
[fol. 432] A. No, sir.
Q. Did you have any understanding with any Federal official that any evidence procured in the raid would be turned over or made available or anything else?
A. No, sir.

Mr. Luckey: Thank you.
Mr. Crawford: Just one moment.

Redirect examination.

By Mr. Crawford:

Q. In my question relating to the residence of Raymond Clark, the defendant here, I inadvertently said Southwest. I meant Southeast. You so understood Southeast Main?
A. Yes, sir. You corrected yourself at the time.
Q. Did I correct myself at the time?
A. Yes, sir.
Q. Just so the record will show that. Now, George, you have been over in the Sheriff's office there for how many years?
A. Twenty-seven.
Q. That is with the exception of the time that you were a chief bosun in the Navy?
A. That's correct.

Q. And, you have conducted many investigations, have you not?

A. Yes, sir.

[fol. 433] Q. How long have you been in plain clothes, George—

A. Since 1941.

Q. —approximately?

A. I was appointed to the detectives about six months before I entered the Navy in August, 1942, and I returned from the Service on January the 15th, 1946.

Q. And, from that time on you were a detective?

A. Yes, sir.

Q. In the department—

A. Yes, sir.

Q. Now, you conducted many investigations investigating the violation of law in this County and State?

A. Yes, sir.

Q. Mr. Minielly, during that period of time and through 1956 was there a common practice and understanding on the part of your office that in the event your investigations would uncover evidence of Federal crimes would you promptly report that to the appropriate Federal bureau charged with the enforcement of that particular crime?

A. Yes, sir.

Q. That is good police practice?

A. Yes, sir.

Q. And you always did it?

A. Yes, sir.

Q. And, when you became a Sheriff's officer—pardon me. [fol. 434] When you became a Sheriff you took an oath of office, did you not?

A. Yes, sir.

Q. Did not that oath recite in substance as follows: "That I hereby swear that I will uphold the law of and the constitution of the State of Oregon and of the United States", is that correct?

A. Yes, sir.

Mr. Crawford: I have no further questions.

Recross examination.

By Mr. Luckey:

Q. You operated independently of the Federal officers, did you not?
A. Yes, sir.

* * * * * * *

[fol. 435] CLAUDE F. CROSS, produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Crawford:

Q. Your name, sir?
A. Claude F. Cross.
Q. Your address?
A. 7625 Southeast 19th, Portland.
Q. Your profession?
A. State police officer, State of Oregon.
Q. And you hold what rank?
A. Lieutenant.
Q. Now, during 1956 were you assigned to what Captain Gurdane referred to as the probe?
A. Yes, sir.
Q. You were under the direction and orders of the Attorney General, Mr. Thornton, State of Oregon?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. And you were doing investigative work in connection with the directive of the Governor authorizing Mr. Thornton to conduct such an investigation?
A. Yes, sir.

[fol. 436] Mr. Crawford: Have those marked separately. Have those marked separately, please.

The Clerk: These will be Defendants' 14 and 15, Mr. Crawford.

Mr. Crawford: 14 and 15?

The Clerk: 15 will be the two-page document.

(Whereupon a photostatic copy of a document entitled State of Oregon Executive Department and a photostatic copy of a two-page document entitled State of Oregon Executive Department Order were marked for identification as Defendants' Exhibit 14 and Defendants' Exhibit 15, respectively.)

* * * * * * *

[fol. 437] Mr. Crawford: I offer Defendants' Exhibit 14 and 15 for this purpose that the witness has just testified without objection that he was assigned to the investigation of what has been referred to here as the probe being a directive issued by the Governor of the State of Oregon to the Attorney General of the State of Oregon, Robert Y. Thornton, during the time covered by the alleged violations in this case and just add on and identify that particular directive and also the—what the Governor's directive contained and for no other purpose.

The Court: Well, I fail to see the relevancy to this matter about it. Do you contend by that—no. Well, I might let the record show what your contentions are. Do you contend that the Sheriff's office had no authority to act in connection with the raid?

Mr. Crawford: No, sir, Your Honor. I intend to show by this witness that he was acting pursuant to this directive under the direction of the Attorney General of the State of Oregon.

The Court: All right.

Mr. Crawford: To explain this witness' activities in [fol. 438] this matter.

The Court: Well, we will let it in under your theory.

(Whereupon a photostatic copy of a document entitled State of Oregon Executive Department Order and a photostatic copy of a two-page document entitled State of Oregon Executive Department Order previously marked for identification as Defendants' Exhibit 14 and Defendants' Exhibit 15, respectively, were received in evidence.)

Mr. Crawford: May I have the defendants' exhibit which is the photostatic copy of the admittance slip to the bank?

(Whereupon the Crier hands the document to Mr. Crawford.)

Mr. Crawford: Mr. Price, please hand this to the witness.

(Whereupon the Crier did as requested.)

By Mr. Crawford:

Q. I direct your attention to 11 and 11-A; 11 being the first page and 11-A the second page. Have you been in the courtroom during this hearing?

A. Yes, sir; most of the time.

Q. Did you hear Mr. Franz' testimony?

A. Yes, sir.

[fol. 439] Q. Did you hear him identify that exhibit?

A. Yes, sir.

Q. That is your signature that appears on the exhibit?

A. Yes, it is.

Q. In all places where it is purported to be your signature that is your signature?

A. Yes, sir.

Q. Now, did you hear Mr. Minielly's testimony?

A. Just now?

Q. Yes.

A. Yes.

Q. This morning?

A. Most of it.

Q. Mr. Cross—wait. I had better ask you for the record, did I ask you what your rank was?

A. Yes, sir.

Q. Lieutenant. And you say Oregon State Police?

A. Right.

Q. Mr. Cross, were you present at the time that Mr. Minielly gave to Mr. Thornton, the Attorney General of the State of Oregon, five tapes, one Minifon, and three reels of Minifon recording wire?

A. Yes, sir.

Q. You were actually present at that time?

A. Yes, sir.

[fol. 440] Q. Did you see Mr. Minielly so give it to Mr. Thornton?

A. It was all on the table. Nobody gave anything to anybody.

Q. But, you were all right around the table?

A. Yes.

Q. Do you know what date that was, Mr. Cross?

A. On the 28th day of May, 1956.

Q. On the 28th day of May, 1956. Now, Captain Gurdane has testified that the evidence which I have just enumerated was in your possession and that you were responsible for it; is that correct?

A. That's right.

Q. And, did that remain in your possession and in your custody until June 4, 1956?

A. Yes.

Q. What did you do with it then?

A. Placed it in the—

Q. Those articles?

A. Placed them in a safety deposit box in the First State Bank of Milwaukie.

Q. Was that box 912?

A. Yes, sir.

Q. Now, did you, from time to time, go into the box and remove the tapes, the Minifon, and the recording wire?

A. Yes, sir.

[fol. 441] Q. Did you replace them in the box?

A. Yes, sir.

Q. And were they on the dates that appear on that Defendants' Exhibit 11 and 11-A?

A. These entries have to do with two different boxes.

Q. Well, I am talking about 912.

A. Well, I have no way of knowing which box I went into.

Q. You had a key to it, didn't you?

A. Yes, sir.

Q. The box, you had a key to it?

A. Uh huh.

Q. Now Mr. Sherk, I believe, has already testified that pursuant to a search warrant on September 5, 1956, he took, pursuant to that warrant, from box 912 in the Mil-

waukie State Bank five tapes, the Minifon, and the three spools of Minifon recording wire; is that correct?

A. Yes, sir.

Q. Were you present at that time?

A. No, sir.

Q. Who was?

A. I wasn't there.

Q. You weren't there?

A. When he took it on September the 5th?

Q. Yes?

A. No.

[fol. 442] Q. Who was there?

A. Well, from hearsay, Captain Gurdane was there.

Q. You didn't use your key?

A. No, sir.

Q. Well, now, look at the previous entry before—immediately before September 5, 1956. Do you note the date? Isn't that "August 13, 1956"?

A. Yes.

Q. Now, at that time did you remove or place in the box the tapes, the recording, the recorders, and the wire?

A. On August 13th they were already in there.

Q. They were already in there?

A. Yes, sir.

Q. What occurred on August 13th, were they taken out?

A. They were temporarily removed from the box and—

Q. And placed back in?

A. Yes, sir.

Q. All right. And, you received those articles that Mr. Sherk recovered under the search warrant from George Minielly?

A. From—technically, it was from the Attorney General.

Q. Well, I am talking about the time when they laid them all on the table and you took them over for safekeeping?

A. I lost the question. Would you—

Q. Maybe I didn't state it very well, Mr. Cross. Mr. Minielly testified that he turned the tape over to Attorney [fol. 443] General Thornton at a time you were present.

A. That's right.

Q. You were assigned the job of looking out after that—those—that evidence, were you not?

A. That's right.

Q. And you did?

A. That's right.

Q. And you returned the tapes on August 13, 1956, into box 912 in the Milwaukie State Bank, did you not?

A. That's right.

Q. You didn't take them out during that period of time?

A. Out of the bank, no.

Q. No. Well, as a matter of fact, you never took them out personally after that, did you, after August 13, 1956?

A. No.

Q. Well, we got it up to there. Do you work in plain clothes or in uniform, Lieutenant?

A. Most of the time in plain clothes.

Q. You do investigative work for the State police?

A. Intermittently. I am not assigned strictly to investigation.

Q. But, you do investigation?

A. On occasions, yes.

Q. In the investigation done by the State police in investigating crimes under State law, if evidence of violations [fol. 444] of Federal law are uncovered do you turn that evidence over to the appropriate Federal agency?

A. Through channels.

Q. Through channels?

A. Uh huh.

Q. Is that a common practice and understanding on the part of the State police?

A. Yes, sir.

Q. And, the appropriate Federal agencies?

A. Yes, sir.

Mr. Crawford: No further questions.

Cross examination.

By Mr. Luckey:

Q. You say "turn over evidence," Lieutenant. Do you mean convey information rather than speaking of turning over physical evidence?

A. Well, it would depend on the situation.

Q. Yes. You have no understanding that immediately physical evidence will be transferred, do you?

A. No.

Q. You operate independently, do you not?

A. Yes, sir.

Q. And, you have no understanding with reference to any Federal authority that any particular case will be given Federal treatment in advance, have you?

[fol. 445] A. No, sir.

Q. You don't know anything about the circumstances of your own knowledge of the initial raid in this case, do you?

A. No, sir.

Mr. Luckey: Thank you very much.

Mr. Crawford: One more question, Lieutenant.

Redirect examination.

By Mr. Crawford:

Q. You took an oath when you became a State police officer?

A. Yes, sir.

Q. Did that oath contain, in effect, that you would swear to uphold the laws and the Constitution of the State of Oregon and of the United States?

A. Yes, sir.

Q. You have endeavored to follow that oath?

A. Yes, sir.

* * * * * * *

[fol. 446] VAYNE GURDANE, recalled as a witness in behalf of the defendants, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Crawford:

Q. You have been sworn, haven't you, Captain?

A. Yes.

Q. You have already testified, haven't you?

A. That's right.

Q. Mr. Sherk came to you to execute the search warrant?

A. That's right.

Q. Did you have the key that actually opened the box?

A. Yes, sir.

Q. That was on September 5, 1956?

A. That's right.

Q. And you, of course, had seen these particular articles of evidence before, speaking of the five tapes, the Minifon recorder, and the three spools of recording wire?

A. Yes, sir.

Q. And you were thoroughly familiar with them; that is, as to their appearance?

A. Well, I probably couldn't identify them if they was mixed up with some others. But I have saw them plenty of times.

Q. And, you turned those—that is, under the search [fol. 447] warrant by virtue of the search warrant you turned those over to Agent Sherk?

A. That's right.

Q. On September 5, 1956?

A. That's right.

Q. Those are the same five tapes and the Minifon recorder and the spools of wire to which Lieutenant Cross testified?

A. That's right.

Q. That is the only time you ever removed the tapes from the box?

A. That's the only time.

Mr. Crawford: That's all.

The Witness: I might add there that the Lieutenant Cross was absent when they arrived with the search warrant is why I—

By Mr. Crawford:

Q. Why weren't you—

A. What?

Cross examination.

By Mr. Luckey:

Q. Captain Gurdane, with reference to the answer to counsel's question that you turned over these tapes in response to the search warrant, as a matter of fact, the search warrant was directed to the premises, wasn't it?
A. That's right.

Mr. Luckey: Thank you.

[fol. 448] Redirect examination.

By Mr. Crawford:

Q. You needed a key to get in, didn't you?
A. That's right.

Recross examination.

By Mr. Luckey:

Q. Unless it were to be forced, is that right?
A. That's right.

Redirect examination (continued).

By Mr. Crawford:

Q. You didn't want to see any bank vault blown or drilled?
A. No.

[fol. 449] JOSEPH SANTOIANA, JR., produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined and testified as follows:

Direct examination.

By Mr. Crawford:

Q. State your full name?

A. Joseph F. Santoiana, Jr.

Q. Are you the special agent in charge of the Federal Bureau of Investigation of this District?

A. Yes, I am.

Q. How long have you been such special agent?

A. In this district?

Q. Yes, sir.

A. Three years.

Q. And, of course, you were here during all of the year 1956?

A. I was active during most of the months of 1956. During some of the months I was sick.

Q. What months were those?

A. June, July, and August.

Q. All right. You have been sitting in the courtroom during the taking of this testimony in this matter?

A. Yes, I have.

Q. You heard it?

A. Yes, I have.

[fol. 450] Q. Prior to May 17, 1956, did you ever receive any complaints from anyone in your capacity as special agent of the Federal Bureau of Investigation concerning alleged wire activities on the part of these defendants?

A. None that I recall.

Q. Well, how sure are you?

A. Rather sure.

Q. It's quite important, Mr. Santoiana.

A. I am sure.

Q. You are sure?

A. Uh huh.

Q. Now, I don't want to be repetitious, but I want you to thoroughly understand, Mr. Santoiana, that my question included complaints from any person—

A. Uh huh.

Q. —concerning any alleged wire activities.

A. Uh huh.

Q. In violation, of course, of Section 605 of Title 47 U.S.C.A.—

A. Uh huh.

Q. —on the part of Raymond Frederick Clark and James Butler Elkins, the defendants in this case.

A. Uh huh. I understand the question.

Q. You are sure that you received no such complaints?

A. None.

[fol. 451] Q. None with reference to it?

A. Yes.

Q. If complaints had been made to your office would you have known about them?

A. Yes, I believe I would have. Uh huh.

Q. In other words, if someone comes in and makes a complaint regarding violation of Federal law it certainly gets to your attention, does it not?

A. Yes; provided, of course, I am in the office. Sometimes I am out of the office for periods of time and they don't come to my immediate attention.

Q. Well, now, let's go back a little bit. Now, you were sick during the months of June, July, and August, of 1956?

A. That's correct.

Q. Now, however, you were on duty during the month of May, 1956?

A. Yes, I was on duty. Of course, on duty for me can mean that I am in the office or any place in the State of Oregon because Oregon is our District. And, I occasionally go out to visit our different agents who are located throughout the State. So, whether I was in Portland on a particular day during May, I would not recall.

Q. No. I am not trying to pin you down to any particular date.

A. All right.

[fol. 452] Q. I am speaking about May, 1956, as a period of time.

A. Yes. Uh huh.

Q. Then, you were not ill, were you, in the months of,

say—for a year and a half immediately prior to May of 1956?

A. No, no extensive illness. Maybe an occasional cold or so.

* * * * * * *

[fol. 453] Q. Is there any record in your office that would indicate whether or not wire-tapping complaints were made to you, say, for the year and a half previous to May 17, 1956, by any person concerning any alleged wire-tapping activities of these defendants?

A. Well, do you have any specific complaint in mind?

Q. No. I just want to know if people ever made any complaints?

A. Well, if I were to divulge that information, Your Honor, I would be giving information that is contained in our files and that is contrary to our instructions.

Q. Mr. Santoiana, I think you missed the point of my question.

A. I probably did.

Q. I just asked you if there was any such records which would indicate whether or not—I am not asking you for the information.

A. Well, to indicate that there were or there weren't would be indicating what is or isn't in our files.

Now, let me answer your question this way, if I may: If a person complains about a violation which appears to be a Federal violation, we make a record of it.

Q. Over which you have primary—

[fol. 454] A. Over which we have jurisdiction, we make a record. Likewise, if they make a complaint of a violation over which we have no jurisdiction we make a record of it and refer it to the appropriate agency.

Q. If you have jurisdiction over it you make a record of it for your files?

A. That is correct.

Q. If it didn't come into your jurisdiction like, for instance, it was a violation of the currency laws, so on and so forth, you probably would make a record of the complaint having been made and refer it to the Treasury Department?

A. Yes, if the person complaining so requested.

Q. Yes. Now, you are—I mean, the F.B.I.—

A. Yes.

Q. —is the agency that is charged with the primary duty of investigating wire-tapping activities in violation of Section 605 and 501 of 47 U.C.S.A.?

A. We are and have been since January of 1953.

Q. All right. Fine. Again, I don't want to be repetitious, or whatnot, but I want to thoroughly understand the situation. I will ask you this question: Is there any complaint —now, I don't ask you to divulge what is in the complaint or the name of the complaint. Is there any complaint in your files complaining of any wire-tapping activities on the part of these defendants prior to May 17, 1956?

[fol. 455] A. That's the same question, isn't it?

Q. Well, a little differently—

A. Yes. The emphasis, or the—was a little different. Well, I would think I would have to give the same answer on that. But, maybe I can answer your question.

Q. If you know.

A. Well, do you want to furnish me the answer? Do you want to give me the answer?

Q. No. You tell me. Sorry.

A. You are asking me the question.

Q. All right. I stand corrected.

A. For the same reason as I stated before, if I answer the question in the positive or the negative I would, I believe, Your Honor, be furnishing information that would—that is or is not contained in our files. And, by Departmental Order 3229 I am prohibited from doing that.

* * * * * * *

[fol. 458] The Witness: If I may interrupt you here now, because I can see what your next question is probably going to be, prior to May 17th, and including May 17, 1956, I had nor did my office any knowledge whatsoever of the raid that was going to be pulled off. We had no prior indication, no prior consultation, no prior advice. We had no indication it was going to be pulled off.

* * * * * * *

[fol. 459] By Mr. Crawford:

Q. When was the first time that your office—speaking, of course, officially—

A. Yes.

Q. —that you had knowledge that the raid was conducted?

A. Well, the first time that we had notice was when we read it in the local press.

Q. Now, which newspaper did you read it in?

A. I don't recall.

Q. It makes quite a little bit of difference.

A. Well, of course, I read both of them, so I don't recall which one I read it in.

Q. Well, then, you're pretty-well briefed on both sides of this controversy?

A. Yes.

Q. Can you give me a date, Mr. Santoiana, when that—

A. Well, it would have been the first day it appeared in the paper. I presume that would probably have been—

Q. The—

A. —May 18th.

Q. May 18th?

A. Yes.

Q. Now, you heard Mr. Sherk testify that he went to the office of Terry Schrunk, the Sheriff of Multnomah County—

[fol. 460] A. Yes.

Q. —on May 22, 1956—

A. Uh huh.

Q. —at about 2:00 o'clock P.M. Was that an official visit of his? Did you order him to do that?

A. Yes, I did.

Q. Was that in response to a request by the State officials?

A. By the State officials, whom do you mean?

Q. Well, Sheriff, State police.

A. Yes.

Q. Who?

A. Sheriff Schrunk.

Q. You know there has been some evidence here, Mr. Santoiana, that in part is explanatory of my questioning you regarding events shortly after the raid?

A. Uh huh.

Q. And, I wish to call your attention to the fact that there is evidence in this court and there was evidence before the Select Senate Committee on Improper Activities of Labor and Management that Sheriff Schrunk under oath testified at that time that upon seizure he called in the F.B.I.?

A. Yes.

Q. Hence, my questioning. Now, did your office see or hear these tapes or any of them after May 22, 1956, and prior to September 5, 1956?

A. Would you repeat that question again?

[fol. 461] Q. Gosh. I don't know if I can. Did you or any members of your staff, meaning the F.B.I.—

A. Uh huh.

Q. —and acting pursuant, of course, always to official direction, hear any of the tapes in controversy in this proceeding or any portions of the tapes in controversy in this proceeding after May 22, 1956, and before September 5, 1956—

A. Now, the question is?

Q. —being the—the latter date being the day of the search warrant?

A. The search warrant. The question concerned hearing the tapes?

Q. Yes.

A. No.

Q. Did you see the tapes or—

A. I personally did not between those two dates.

Q. Did any member of your staff see the tapes between those dates?

A. I believe Mr. Sherk did.

Q. What date was that, Mr. Santoiana?

A. I believe he testified it was August the 13th, 1956.

Q. Now, was there any other occasion on which either you or any member of your staff saw the tapes in question here other than the dates that you have mentioned and [fol. 462] prior to September 5th?

A. No.

Q. So, then, Agent Sherk saw them on May 22, 1955?

A. Yes.

Q. He, again, saw them on August 13, '56?

A. '56, yes.

Q. He, again, saw them on August 13, 1956, but did not play them?

A. Well, I have no first-hand knowledge of what he did.

Q. You heard him testify?

A. I beg your pardon?

Q. You heard him testify?

A. Yes. Uh huh. Well, I can only testify as to what he testified to; that he did not play them on August 13th.

Q. I will take his word for it.

A. O.K.

Q. Then, the next time that either you or any member of your staff saw the evidence in controversy here was after the box in the Milwaukie State Bank was opened pursuant to the search warrant?

A. That is correct.

* * * * * * *

[fol. 519] OPINION DENYING PETITIONERS' MOTION TO SUPPRESS

The Court: Inasmuch as this matter has consumed the best part of four days, I have had that entire period of time to give my entire attention to the legal issues that are raised by the hearing and of the contentions of the parties as we were advised of them almost at the threshold of the hearing. I think that in order to advise counsel as to what my thoughts are about it, I will just take it in the order that it was presented by counsel for the defendants upon [fol. 520] their so-called first theory that the search made by the agents of the Federal Bureau of Investigation was not itself a valid search and seizure pursuant to Rule 41, subsection E.

Now, for the reasons that were expressed the other day, this Court does not deem it necessary to decide that issue in order to determine whether or not the articles moved against are within the legal possession of this court now. Therefore, the Court will make no finding as to whether or

not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal upon its face. Nor will this Court determine that the search and the seizure made by the special agent Sherk, as he said, in the belief that he was armed with a legal search warrant was in fact a legal exercise of search and seizure under such warrant. So, that disposes of the Court dealing with that proposition number one.

Now, with reference to the defendants' proposition two where an illegal search and seizure by State officers with participation on the part of the Federal agency vitiates and, therefore, renders void any subsequent acquisition of the articles by that Federal agency or any of its personnel or any Federal personnel acting thereunder, our whole [fol. 521] answer to that question is found within the interpretation of the United States Supreme Court of Lustig against the United States reported in Volume 338, United States Reports commencing at page 74. That was a five to four split decision among the nine justices of the court. The majority of the court held on various grounds, not in agreement among themselves, that under the particular facts and circumstances of that case there was such participation on the part of a Federal officer that tainted his possession and his seizure of the property with the illegality of the search initiated by the State officials. There again there is a split of authority among the nine—of opinion among the nine justices as to the factual situation in that case.

I think it must be conceded that the majority, for reasons known to them only, stated that there was reserved a question which they did not feel that it was necessary for them to decide at that instant because they had disposed of the issue upon other grounds. And that is whether or not the doctrine originally in the so-called Byars case and then further extended in the Lustig case should even go further and render it even unnecessary—I should say, render it either unnecessary to determine whether or not the Federal authorities participated in the State illegal search

and seizure because it would—the query, would not the State's illegal search and seizure of the articles in the first [fol. 522] instance in and of itself thereafter render illegal any subsequent possession by Federal authorities?

So, in the language of Justice Frankfurter who points up that reservation by saying that he finds it unnecessary to decide whether an illegal search by the State officers bars the introduction of the fruits of the search in a Federal court, the justice joins in that opinion they being Justice Murphy with whom Justices Douglas and Rutledge concur. But, Justice Murphy goes further and says: "But my dissenting views in Wolf vs. Colorado decided this day, make clear my position on the question he"—meaning Justice Frankfurter—"reserves." in the majority opinion. Justice Murphy with the concurrence of Justices Douglas and Rutledge say, "It is my opinion the important consideration is the presence of an illegal search. Whether State or Federal officers did the searching is no consequence to the defendant and it should make no difference to us." That, of course, is a dissenting opinion. And, as of today it is not the decision of the Supreme Court of the United States.

The present opinion of the Supreme Court of the United States is succinctly stated as follows by Mr. Justice Reed in his dissenting opinion to the holding and judgment of Lustig vs. United States wherein he says: "My understanding of the rule as to the use of evidence in a Federal criminal trial obtained by State officers through a search and seizure conducted by them under State authority is this: [fol. 523] While it is true that the mere participation in a State search of one who is a Federal officer does not render it a Federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violation of the Constitution by circuitous and indirect methods", citing the Byars case. In the Byars opinion this court went on to say that the Federal government had the right "to avail itself of evidence improperly seized by State officers operating entirely upon their own account, but the rule is otherwise when the Federal government itself through its agents acts as such, participates in the wrongful search and seizure." This is the rule which the Court affirms today.

This District Court sitting here today cannot anticipate whether or not the Supreme Court as it is constituted today or might in the future be constituted will overrule that rule, nor can this District Court sitting today anticipate that the Supreme Court as it is constituted today will accept the opinion of Mr. Justice Murphy: —and Justices Douglas and Rutledge concurring in that—"The question whether State or Federal officers did the searching is of no consequence to the defendant and it should make no difference to the court."

In other words, if the search in the first instance was illegal by State officers it is vitiated and tainted forevermore and no subsequent acquisition of the same could be acquired by the Federal government without it being viola- [fol. 524] tive of the defendant's rights.

So, therefore, this Court must accept the law as it is today and that law is expressed in the Lustig case by reason of the facts that are set forth in that factual circumstance.

There again the nine justices could not among themselves agree as to what the facts were or the interpretation of the facts. Perhaps it's better. The District Court and the Court of Appeals who heard the matter found from the evidence that there was no participation by the Federal officer. The majority opinion reviewed the facts de novo and disagreed with the District Court. And, the Court of Appeals upon the facts found this from the facts: After Greene had in effect scouted about, peered through the keyhole, I think, was the expression, finding no evidence of a crime he communicated his suspicion to State officers who thereupon entered the hotel room and made the search. And, the court says: "During all this time"—I will go back a little further. "At about four o'clock in the afternoon of the same day, Koerner and three city detectives secured a key from the manager of the hotel and entered Room 402. The police officers proceeded to empty the bags and the drawers of a bureau and thus came upon the evidence sought to be suppressed. What they found indicated counterfeiting of currency rather than of race track tickets. [fol. 525]. "During all this time, Greene had remained at police headquarters because he 'was curious to see what

they would find.' On finding what they did find, Koerner sent word to Greene, who came to the hotel and examined the evidence in controversy. When Lustig and Reynolds eventually returned they were arrested and searched by the detectives. As various articles were taken out of their pockets, those deemed to have bearing on a counterfeiting currency were turned over to Greene. He observed that the ink on a $100 bill taken from Reynolds had not been tampered with. Greene was trying to discover what had been used to make the impression on the 'similitude' found in the room. After the search was completed Greene and the city police gathered up the articles revealed by the search and carried them to the police station. Some of these articles were given to Greene before he left Room 402; all were eventually turned over to him."

Now, most rightfully, upon that construction of the facts the Court found that Greene participated in the search and seizure, not necessarily at the inception of the same, but at a time before it was completed. And, he participated up to its completion thereafter. In applying those facts with that construction the court held that the search and seizure so participated in by Greene rendered the search and the seizure violative of the defendant's right under the Fourth Amendment to the Constitution and suppressed the evi- [fol. 526] dence.

Now, one further extension of the Lustig doctrine is found in one of the cases the Court cited at a prior time in these proceedings. That was upon the Court's discussion of the motions to dismiss. That is the United States against White, arising in the Seventh Circuit and being a Circuit Court of Appeals decision reported in 228 Fed. (2d), commencing at page 832. Counsel will recall that in that case that city police officers in connection with investigating a suspected narcotics charge—at least, one of them, intercepted a telephone conversation by using an extension phone with the knowledge of one of the participants to the conversation. The court adopted the rule that under such circumstances the interception of the telephone conversation was with consent and that therefore Section 605 of Title 47 U.S.C. had no application and would not

render the information received by the interception of the telephone conversation inadmissible.

Then they were confronted with the following position of the defendant:

> "Defendants also charge, but fail to argue in their brief, that a search of White was violative of his constitutional right and money taken from his person should not have been admitted as evidence. We shall consider this point. At the trial, defense counsel [fol. 527] moved orally and unsuccessfully to suppress evidence claimed to have been obtained by the Government by means of an illegal search and seizure. The oral motion to suppress did not allege that the property seized was the property of the defendants. In Samson vs. United States, the court said that this failure in itself 'would seem to be sufficient ground for the denial of the motion',"

and cites two other circuit court cases. However, this Court makes no particular—places no particular effect on that rule.

> "Moreover, in this case the alleged illegal search and seizure were made by officers of the City of Chicago, and not by a Federal agent. Even though the evidence thus obtained was turned over to the Federal government for prosecution of the defendants, that fact does not preclude the Federal authority from using the evidence,"

citing a Fifth Circuit case Shushan vs. United States. Then it states:

> "In Lustig vs. United States the court said: 'The crux of that doctrine is that a search is a search by a [fol. 528] Federal official if he had a hand in it; it is not a search by a Federal official if evidence secured by State authorities is turned over to the Federal authorities on a silver platter.'
>
> "In this case the alleged searches and seizures were made by city police officers, and on the following day the Federal authorities became interested in the case.

> Federal agent Cass testified that it was on the latter date that he first became aware of the incidents involved. There was no other evidence of Federal participation. Even if the search and seizure were unreasonable, the Government none the less was entitled to use the evidence secured, unless there was such complicity by Federal officials as to bring the seizure within the prohibition of the amendments to the Federal Constitution. Parker vs. United States,"

a Ninth Circuit case.

So, in deciding this second contention of the defendants we take up his first exception of the rule which the defendants claim that this seizure by the State officers was solely for the purpose of prosecuting a Federal case or making a Federal prosecution. Now, it is most clear from the evidence and most certainly there is no evidence in this [Vol. 529] case which this Court can find that special agent Sherk or any of the personnel of the F.B.I. office in Portland or any other agent of the United States had any knowledge or information or suspicion of any kind that this search was being contemplated or was eventually made by the State officers until they read about it in the newspaper.

And, I recognize counsel's contention that there was some thought that the District Attorney of Multnomah County contemplated a Federal prosecution when he wrote the letter of May 18th, the following day of the search, to the Attorney General of the State of Oregon wherein it is cited that the District Attorney believed that a Federal crime—that the articles seized were some evidence of a Federal crime.

However, there is nothing in that letter to indicate that that county official had any intention of making a Federal prosecution out of the case. He merely asked the Attorney General of the State of Oregon whether or not he would consent of this District Attorney going forward and presenting this matter to the Grand Jury.

The Court makes that as a finding of fact from the evidence produced.

Now, what was the purpose of the State officials in making this raid? I am of the official opinion, as it appears from

all of the evidence in the case, that the search and seizure made by the State officials as shown by the evidence was [fol. 530] conceived in their mind and was carried out and consummated with the sole view of obtaining evidence for a State prosecution as distinguished from a Federal prosecution.

Now, with reference to the exception two which the defendant claims changed the rule of the Lustig case—or, brings them within an exception to that apparent rule, I will put it that way—that because there was a common practice and understanding between the officials of Multnomah County and the F.B.I. officials for the District of Oregon that evidence seized by the State or, contra, by the Federal authority would be turned over to the county authorities for the purpose of the county authorities prosecution of a violation of a law under their jurisdiction.

Most certainly all of the officers who appeared have said that it was good police practice to exchange cooperative work, cooperative facilities, of one branch; that is, State and Federal, in the help of each other in their respective spheres. Any common man would agree with that.

On the other hand, can it be said that because that is a good police practice that that is in and of itself violative of any citizen's rights under the Federal or State Constitution? Has there been a tacit understanding and an agreement and a search and seizure had in this case pursuant to a binding agreement between these individuals that [fol. 531] evidence seized by them would not be used of any violation of a law under their jurisdiction but would be turned over to the other for prosecution solely of a violation of the law within their sphere of authority? That, of course, would be making one the agent of the other.

This record is entirely devoid of any such practice or understanding among the officers of the two spheres, State and Federal, as shown by the evidence in the case. So, for those reasons I am of the firm opinion that the defendants' motion for suppression of the articles referred to in the evidence and returning the same to them, if it be in the joint motion, should be denied in all respects.

I was hesitating and wondering whether it was necessary to make any further comment with reference to the legal

position before the Court of one court interfering with the jurisdiction of the other. I think I will rely on what the record shows.

Now, you may make your record.

Mr. Crawford: We except to the ruling, if Your Honor please.

The Court: Very well.

Mr. Crawford: In all particulars as it is contrary to our contentions in this matter.

The Court: Let the record show your exception.

* * * * * * *

[fol. 536]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Petition of JAMES BUTLER ELKING and RAYMOND FREDERICK CLARK, Petitioners for a stay to enable the filing of a petition for Writ of Prohibition.

MOTION FOR STAY

To: The Above-entitled honorable Court and to the Honorable William Denman, Chief Judge thereof:

Come now the petitioners, by and through Walter H. Evans, Jr., William C. Crawford and Burton J. Fallgren, their attorneys, and respectfully move for an Order of this Court, or of the Chief Judge thereof, for a stay of the proceedings by the Honorable William G. East, Judge of the United States District Court for the District of Oregon, in the trial of that certain indictment No. C-18321 against these petitioners, in the following respects, to-wit:

1) Requiring the Honorable William G. East, Judge of the said Court to refrain from compelling, as Judge of said Court in the trial of said cause C-18321, the giving of testimony, or producing of evidence, or both, by those officials of the County of Multnomah and of State of Oregon, who are presently subject to the injunction of

the Circuit Court of the State of Oregon for the County of Multnomah, in any manner in violation of said injunction, pending the further order of this Court;

2) For a further order of this Court permitting petitioners herein a period of three judicial days within which to prepare and file, in conformity with the rules of this Court, the papers, motions and pleadings necessary for the proper presentation to this Court of a petition for a writ of prohibition directed to said Honorable William G. East, as Judge of said Court;

3) Petitioners further move for an immediate consideration of this motion for a stay and for the telegraphic notification to the attorneys for petitioners herein and [fol. 537] similar telegraphic notification to the Honorable William G. East, Judge of said District Court of the decision of this Court, or the Chief Judge thereof, on this motion for a stay.

Walter H. Evans, Jr., Attorney for Petitioner Elkins, Portland Trust Building, Portland, Oregon.

William J. Crawford, Corbett Building, Portland, Oregon, Burton J. Fallgren, Attorneys for Petitioner Clark, Corbett Building, Portland, Oregon.

State of Oregon,
County of Multnomah, ss.:

I, Walter H. Evans, Jr., one of the attorneys for the petitioners herein, do hereby certify that the foregoing Motion for Stay is filed in good faith, in my opinion is well founded in law and is not interposed for the purpose of delay other than as therein requested. I further certify that in support of this motion, and any subsequent proceedings therein, petitioners intend to rely on the provisions of Article I, Section 9 of the Oregon Constitution, the provisions of Chapter 141, Oregon Revised Statutes, on the decisions of the Supreme Court of the State of Oregon interpretative thereof, and upon decisions of the United States Supreme Court in *Ex parte Peru*, 318 U. S. 578, and the cases found in the annotation at

Title 28, Section 1651 U.S.C.A., and upon the annotation contained in 77 ALR 245.

Petitioners will rely upon the proposition that the decision of the United States Supreme Court in *Rea vs. U.S.*, 350 U.S. 214, calls for the granting of the relief sought here. That a Federal Court has the duty to enjoin a Federal official from testifying in a state criminal prosecution as to information and evidence illegally seized by [fol. 538] said federal official, so as to enforce the federal policy against illegal searches and seizures and to correct and prevent abuse of federal process; that, likewise, a state court has the duty to enjoin state officials from testifying in a federal prosecution as to information and evidence illegally seized by state officials, so as to enforce the state's policy and to correct and prevent abuse of state process.

Walter H. Evans, Jr., of Attorneys for Petitioners.

[fol. 539]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AFFIDAVIT

State of Oregon,
County of Multnomah, ss.:

I, Walter H. Evans, Jr., being first duly sworn, depose and say as follows:

That I am one of the attorneys for the petitioners herein and I make this affidavit in support of petitioners' motion for a stay to enable petitioners herein to file a motion for leave to file a petition for a writ of prohibition directed to respondent herein.

That James Butler Elkins and Raymond Frederick Clark, petitioners herein, are joint defendants in that certain indictment No. C-18321 heretofore returned in the United States District Court for the District of Oregon by the United States Grand Jury for this district in a manner more fully described below; that the trial of petitioners herein, as defendants on said indictment, com-

menced in the United States District Court for the District of Oregon before the Honorable William G. East, a duly appointed, qualified and acting judge thereof (hereinafter referred to a Judge East) at about 10:00 A.M. on Tuesday, April 16, 1957, and that said trial is in progress at the time of this affidavit.

That at the time of dictating this affidavit, the court is engaged in the playing, under discovery procedure, of certain tape and wire recordings more fully referred to below, outside of the presence of the jury, and that following these discovery proceedings and probably tomorrow, Saturday, April 20, 1957, the testimony to be pre-
[fol. 540] sented by the United States, as plaintiff, will be commenced; that due to the lack of time and sequence of happenings more fully stated below, it has been physically impossible to present this matter to this Honorable Court prior to this time; if this court does not act immediately upon the motion submitted herewith, the petitioners herein, as defendants on said trial of said indictment, will be irreparably harmed as appears more fully from the various pleadings and documents being sent by air mail in support of and in addition to this telegraphic communication.

That in the afternoon of Thursday, May 17, 1956, William M. Langley, district attorney for Multnomah County, Oregon, executed an affidavit for a search warrant directed to the premises of petitioner Clark in Portland, Oregon, and presented the same to the Honorable John R. Mears, Judge of the District Court for Multnomah County, Oregon, who, based thereon, issued a search warrant as requested by said affidavit; that said search warrant was, late in the evening of said day, executed by Terry D. Schrunk, then sheriff for Multnomah County, Oregon, and several of his deputies at the premises of petitioner Clark, and said sheriff and deputies seized certain items including certain tape and wire recordings and wire recorder; that the day following, Friday, May 18, 1956, was primary election day in the State of Oregon and hence a nonjudicial day; that Saturday, May 19, 1956, and Sunday, May 20, 1956, were likewise non-judicial days and that on Monday, May 21, 1956, the first

judicial day following said seizure, a motion was filed in the Court of said Judge Mears to suppress the evidence obtained in the search and seizure held on May 17, 1956.

That the said Judge Mears held a hearing on said motion to suppress lasting from May 21, 1956, to May 23, 1956, inclusive, at the end of which said Judge Mears ordered the evidence obtained in said raid May 17, 1956, suppressed; that, however, in the interim and on May 22, 1956, said William M. Langley, as district attorney for [fol. 541] Multnomah County, caused some of the evidence so seized, including the recordings, to be presented to the Grand Jury for Multnomah County, Oregon, then in session, as a result of which said Grand Jury for Multnomah County returned an indictment against petitioners Elkins and Clark as defendants under the provisions of the Oregon statute on wiretapping.

That said Judge Mears, upon holding said search and seizure illegal for, among other reasons, the ground that the affidavit presented by said district attorney was clearly insufficient, instead of returning the seized items, including the recordings, to the persons whose premises had been searched, including petitioner Clark, directed that the sheriff of Multnomah County turn over said seized items to Robert Y. Thornton, Attorney General for the State of Oregon who was at that time conducting an investigation into alleged vice and corruption in Multnomah County pursuant to a directive of the governor of the State of Oregon, and in compliance therewith, the sheriff for Multnomah County turned over said items, including said recordings, to the Oregon State Police for the benefit and on behalf of said Attorney General.

That petitioners herein, as defendants in said state indictment, subsequently moved in the Circuit Court for suppression of said evidence as evidence against them, and on or about the 17th day of September, 1956, the Honorable Frank J. Lonergan, Judge of the Circuit Court for Multnomah County, ordered said evidence, including said recordings, suppressed as evidence against petitioners as defendants on said state indictments, and directed that said items be held by the Attorney General subject to the order of the Court.

That on or about the 5th day of September, 1956, agents of the F.B.I. acting under a search warrant issued by the United States Commissioner, seized said recordings from a safety deposit box in the First State Bank of [fol. 542] Milwaukie, Oregon, where they had been placed for safekeeping by the Oregon State Police; that subsequently said recordings were considered by the United States Grand Jurors and on or about February 4, 1957, said grand jurors returned indictment No. C-18321 against petitioners herein as defendants for violation of the federal wiretapping statutes, §605, Title 47 U.S.C.A.

That subsequently petitioners herein as defendants on said federal indictment, moved to suppress said recordings as evidence against them, in support of which motion petitioners produced testimony before said Judge East from April 9th to and including April 12, 1957, at the close of which said Judge East denied the petitioners' motion to suppress.

[fol. 543] That thereafter, as soon as was humanly possible, petitioners filed proceedings in the Circuit Court of the State of Oregon for Multnomah County for an Order to Show Cause directed to those state and county officials who participated in the illegal raid of May 17, 1956, or acquired information thereby, requiring them to appear and show cause why they should not be restrained or enjoined from testifying or producing evidence in the manner described below in said United States District Court on said indictment No. C-18321 against petitioners, as defendants therein. That said Circuit Court set the return date on the Order to Show Cause for 2:00 P.M., Monday afternoon, April 15, 1957, and, after hearing argument, said Circuit court for the State of Oregon on Tuesday morning, April 16, 1957, issued a temporary restraining order restraining said state and county officials from giving testimony in said United States District Court or producing evidence thereon with respect to any of the matters surrounding and concerning the illegal search and seizure of May 17, 1956, and with respect to any of the items seized and including tape and wire recordings, copies thereof, or communications contained thereon at the trial of these petitioners as defendants

on said Federal indictment, as to any items seized in said raid of May 17, 1956, or any information based thereon; that a copy of said Circuit Court Order is being attached to this original Affidavit, being air mailed to this Court. That said Circuit Court Temporary Restraining Order was for 48 hours, or until Thursday morning, April 18, 1957, and said matter was continued, after further oral argument, by said Court until this morning, Friday, April 19, 1957. That at 9:30 A.M. this morning, Friday, April 19, 1957, the Honorable Charles R. Redding, Presiding Judge of said Circuit Court granted the temporary injunction sought by petitioners against the state and county officials concerned, enjoining them, so as to prevent said officials from further violating petitioners' constitutional rights against illegal searches and seizures, and so as to correct the abuse of process by which said state and county [fol. 544] officials obtained said items, including said recordings from petitioners; that a copy of said Circuit Court Order of Tuesday, April 16, 1957, and a copy of the memorandum opinion of said Judge Redding delivered this morning, Friday, April 19, 1957, are being air mailed to this Court, but are not telegraphed herewith for reasons of bulkiness.

That at the commencement of the trial of these petitioners as defendants upon indictment No. C-18321 in said United States District Court, about 10:00 A.M., on Tuesday, April 16, 1957, said Judge East, after being handed a copy of said Order of the Oregon Circuit Court, and after reading the same into the record, stated that:

> "... I have reached this firm conclusion that the order just read so far as it attempts to interfere with the process of this Court here before issue is void and is a nullity and of no force and effect."

and said Judge East, further stated that:

> "... I have reached the conclusion that if it determines that there appears to be an irreconcilable conflict during the proceedings between any process of this Court and of any State Court it must necessarily follow for the reasons given that the processes of this Court must stand superior."

That following the selection of a jury for the trial of said indictment No. C-18321, there ensued, under supervision of said Judge East, discovery proceedings to permit these petitioners, as defendants therein, to hear the tapes and wire recordings played outside the presence of the jury and to permit these petitioners to make copies of said tape and wire recordings for the purpose of subjecting the same to scientific examination; that said Judge East has indicated that as soon as said discovery proceedings are completed, probably some time today, Friday, April 19, 1957, opening statements will be made and the testimony itself will be commenced. That said Judge East has further indicated that the trial will continue tomorrow, Saturday, April 20, will recess on Sunday, April 21, and take up again on Monday, April 22, 1957; that your affiant herein believes that among the first wit-
[fol. 545] nesses called by the government to testify against petitioners herein in the trial of said indictment will be those state and county officials subject to said State Court injunction, and your affiant respectfully believes that said Judge East intends to compel said state and county officials as witnesses in Federal court to testify concerning the matters as to which they have been enjoined by said State Court.

That these petitioners, as defendants in the trial of said Federal indictment, will be irreparably harmed if said Judge East, compels said state and county officials to testify despite said State Court injunction.

That there will be no way by which such error can later be adequately corrected if it is later determined that said Judge East acted erroneously in compelling said state and county officials to testify in violation of said State Court injunction. That by virtue of the fast moving occurrences of the various events, and by virtue of the fact that these petitioners had no standing to secure or attempt to secure said State Court injunction prior to the ruling of said Judge East on petitioners' motion to suppress as to said federal indictment, there has been virtually no time within which these petitioners could apply to this Honorable Court for a Motion for leave to file a Petition for a Writ of Prohibition directed to said Judge East; that these

petitioners, as defendants in the trial of said federal indictment will be irreparably harmed and will be deprived of any adequate remedy unless they have sufficient time to attempt to secure a Writ of Prohibition from this Court requiring said Judge East to refrain from compelling said state and county officials to give testimony or produce evidence in violation of said state court injunction.

That this Affidavit is made in support of a motion, both of which are directed to this Honorable Court, and to the Chief Judge thereof, by telegraph because of the absolute pressing necessity of time, for an Order of this Court staying said Judge East from compelling said [fol. 546] state and county officials to testify or produce evidence contrary to the provisions of said State Court injunction, so as to permit these petitioners a reasonable time to prepare and file a motion for leave to file a petition for a writ of prohibition.

That on behalf of petitioners I respectfully request this Court immediately to consider this matter, to grant the stay requested herein and in the motion filed herewith, and to notify petitioners and the Honorable Judge William G. East of its action thereon; that executed copies of this Affidavit, the Motion, and the documents referred to therein are being air mailed to the Chief Judge of this Court immediately; that I have orally advised the Honorable William G. East of my action in making this telegraphic application and I will immediately furnish to said Judge East a copy of all matters being mailed to this Court.

Walter H. Evans, Jr.

Subscribed and sworn to before me this 19th day of April, 1957.

Gerald F. Bartz, Notary Public for Oregon, My Commission expires: 2-1-60.

[fol. 547]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Plaintiffs,

—vs.—

GEORGE MINIELLY, TERRY SCHRUNK, HAL LYNN, GARTH STACKHOUSE, RICHARD SACANTI, ARTHUR HEEM, WILLIAM M. LANGLEY, ROBERT Y. THORNTON, VAYNE GURDANE, CLAUDE CROSS, F. O. MAISON, HOWARD LONERGAN, OSCAR HOWLETT, and other State and County officials unknown to plaintiffs, Defendants.

MEMO OPINION

The Honorable Charles W. Redding, Circuit Judge.

[fol. 548] Plaintiffs in the within suit now stand indicted by a Grand Jury for Multnomah County, State of Oregon, on substantially the same charge as that on which they are now being tried in the Federal District Court for the District of Oregon. This State indictment was based on evidence obtained by a search and seizure made pursuant to a search warrant issued on May 17, 1956, by a State Judge, the Honorable John R. Mears, Judge of the District Court for Multnomah County. Plaintiffs herein on May 21, 1956, the first judicial day subsequent to said search, moved to suppress the evidence on the ground that the search warrant was improperly obtained on a faulty affidavit in that the Honorable William M. Langley, District Attorney for Multnomah County, who applied therefor, did not have personal knowledge of the facts set forth in his affidavit upon which Judge Mears was prevailed upon to grant said search warrant.

On May 23, 1956, Judge Mears granted defendants' (plaintiffs herein) motion to suppress the evidence ob-

tained in said illegal search and seizure. However, prior thereto and on May 22, 1956, a Grand Jury for Multnomah County acting under the supervision and direction of the Honorable William M. Langley, District Attorney for Multnomah County, returned the indictment hereinabove referred to. Subsequent thereto, and on September 17, 1956, the Honorable Frank J. Lonergan, Presiding Judge of the Circuit Court for Multnomah County, on motion of the defendants named in said State indictment, the plaintiffs herein, again held that the search and seizure based upon the above-mentioned search warrant was illegal and directed that the evidence obtained in the search made pursuant thereto be surrendered to the Attorney General of the State of Oregon and by him held pending the further order of the Court and that any copies made of any re-[fol. 549] cordings or tapes obtained in said search be destroyed.

On September 5, 1956, certain Federal officials gained possession of certain tapes and/or recordings which it is contended in the above-mentioned Federal Court proceeding were obtained by State officials on May 17, 1956, by authority of the illegal search warrant of the same date.

In February, 1957, subsequent to Judge John R. Mears' finding that the search of May 17, 1956, based upon a search warrant which he issued was illegal, as well as subsequent to Judge Lonergan's holding that said search and seizure was illegal, a Federal Grand Jury, based upon certain recordings and/or tapes allegedly obtained upon said illegal search and seizure, returned an indictment against the plaintiffs herein. The plaintiffs are now on trial in the District Court of the United States for the District of Oregon on said Federal indictment. The case against them in the Federal District Court will be made by testimony of State officers based on information obtained by them while conducting the illegal search of May 17th. That, at least, is the basis for this suit.

The defendants, having exhausted every remedy known to them or their counsel in the Federal District Court where they unsuccessfully sought suppression of the evidence allegedly seized from the home of Plaintiff Clark on May 17, 1956, when State officers, to wit deputy sheriffs

for Multnomah County acting pursuant to invalid State process, forced the front door of said home and allegedly removed therefrom certain personal property; plaintiffs now seek in this suit relief from threatened further wrong to them by State officers who by their testimony in Federal Court are about to divulge information which said State officers wrongfully obtained pursuant to State Court process erroneously issued.

[fol. 550] The question posed by this suit does not involve a question of whether this Court has the power or authority to interfere with the Federal Court—were this the question, the answer would be simple and would, of course, be in the negative—but rather, the question here presented for decision is—Does a State Court have the power and authority to prevent further irreparable injury to the citizens of its state growing out of the abuse of its own process? Does it have the right to correct its own wrongs where State officers, acting illegally by virtue of an abuse of the State Court's own process, violate the Constitutional rights of a resident of the State of Oregon? In other words, does a State Court of the State of Oregon, upon discovery of an abuse of the State Court's own process, have power to prevent its officers from testifying as to matters which were learned of solely and exclusively through and by virtue of such illegal State process in direct contravention of the Constitutional guarantees of the Constitution of the State of Oregon? The Attorney General of the State of Oregon—the Honorable Robert Y. Thornton,—upon careful consideration, states he can see no legal obstacle to the exercise of such power. This question, it would appear to this Court, must, of necessity, be answered in the affirmative.

The general view of the Federal Courts is that evidence, though obtained by an illegal search, is nevertheless admissible in a Federal Court where the search was made for the purpose of enforcing State law by State officers without Federal participation. This proposition is supported by numerous cases, among which are the following: *Weeks* v. *United States* (1914) 232 U.S. 383; *United States* v. *Dinguid* (1945) 325 U.S. 857; *United States* v. *Pugliese* (1945) 330 U.S. 811, stating that: "It is well-settled that

the United States may avail itself of evidence improperly [fol. 551] seized by State officers operating entirely on their own account." Also see note in 50 A.L.R. 2d 531 at 573.

If I may be so bold, may I interject I find it difficult to understand or accept this Federal rule. I find far more palatable the view expressed by Mr. Justice Murphy and concurred in by Mr. Justice Douglas and Mr. Justice Rutledge in Mr. Justice Murphy's dissenting opinion in *Lustig* v. *United States*, 338 U.S. 74, where Mr. Justice Murphy says:

> "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us."

It is encouraging to note in recent decisions of the Supreme Court of the United States upon this subject what I discern to be an ever greater sympathy for the views expressed in the foregoing dissenting opinion by Mr. Justice Murphy as concurred in by Mr. Justice Douglas and Mr. Justice Rutledge.

Rea v. *United States*, 350 U. S. 214.

The corollary of the proposition that evidence obtained in an unlawful search and seizure by State officers without Federal participation is admissible in a prosecution in a Federal Court is the proposition that evidence obtained in an unlawful search and seizure by Federal authorities without participation of State or local officers is admissible in a prosecution in a State Court. This view has been followed in some of the states.

Inconsistent with the theory just stated is the view taken in other State jurisdictions that evidence obtained by Federal officers by a search and seizure unlawful under Federal law must be suppressed in a prosecution in the State Courts.

To this Court it is most reassuring that the rule heretofore followed in some states that evidence obtained in an [fol. 552] unlawful search and seizure by Federal authorities without participation of State or local officers is admissible in a prosecution in a State Court has been ren-

dered of little practical consequences by the 1956 decision of the United States Supreme Court in *Rea* v. *United States*, 350 U. S. 214.

The well-settled Federal rule that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account completely and conclusively deprives a Federal Judge of the power or the authority to prevent the reception of evidentiary matter though improperly seized by State officers in direct contravention of the State Constitutional guarantees against unlawful search and seizure. This anomaly would completely and finally deprive the plaintiffs in this proceeding from relief either in the United States District Court of the State of Oregon where they now are on trial or, indeed, from relief on appeal from an adverse verdict in said Court though based upon evidence obtained in violation of their guarantees of freedom from unlawful search and seizure given them by the Constitution of the State of Oregon unless this Court in this proceeding is determined to have and exercises the power to restrain the defendants herein named from giving testimony with reference to information obtained by and through the illegal State Court process hereinabove referred to.

The State Court, and the State Court only, has authority to control State officers; and it is the State's function, acting by and through the Courts, to determine its policy concerning illegal search and seizure.

This Court had primary jurisdiction over the subject matter of the property—personal property situated in an Oregon residence.

[fol. 553]. This Court had actual physical custody and jurisdiction of the articles in question—one Judge had already ruled the search was illegal and ordered the items turned over to the Attorney General, an indictment in State Court based on the articles had been returned and is still pending, another motion to suppress had been filed in Circuit Court and while it was pending the property was seized by the Federal officers; Judge Lonergan subsequently reiterated the holding that the search and seizure was void and ordered the tapes held by the Attorney General subject to the order of the Court.

The order sought of this Court in this proceeding would not interfere in any way with the jurisdiction or policy of the Federal Court. It would not restrain the State officers named defendant herein from testifying or from attending Federal Court or from responding to process. It simply restricts them from testifying concerning the "fruits" of the illegal tree and, in effect, says to the Government exactly what the Government has said to the States in the Rea case: You may make your own policy as to prosecution and prosecute as you wish but we will not permit our officers to violate our law by an abuse of this Court's own process and then use the illegally obtained information to help you prosecute.

Were it not for the well-settled Federal rule hereinabove referred to that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account, I would have abiding confidence that the plaintiffs herein in their trial before the able Federal Judge before whom they are presently being tried would have no occasion for apprehension of violation of their Constitutional rights—whether guaranteed by the Constitution of the State of Oregon or of the United States. Indeed, were it within the discretionary powers [fol. 554] of the Federal Court to exclude evidence improperly seized by State officers acting illegally in contravention of the Constitutional guarantees of the Constitution of the State of Oregon, I would be the first to acknowledge it to be presumptuous of any Court or, indeed, any person to anticipate an abuse of that discretion by the learned Federal Trial Judge. Unfortunately, under the Federal rule, a Federal District Judge is powerless to exclude evidence of State officers, though such evidence be obtained in direct violation of State Constitutional guarantees, unless such illegal seizure is participated in by the Federal authorities.

In granting the plaintiffs the relief they seek in this proceeding, I do not consider that I am showing the slightest lack of confidence in the learned Federal Trial Judge's complete devotion to the concept of human rights enshrined in the history and the basic Constitutional docu-

ments of the English-speaking peoples. Indeed, the Federal Judge before whom the plaintiffs in this proceeding are presently on trial served with distinction as a member of the Circuit Court Bench of this state for many years. I prefer to believe I am causing to be done that which the learned Federal Trial Judge would, himself, do were he not prevented from so doing by the Federal rule that evidence, though obtained by an illegal search, is nevertheless admissible in a Federal Court where the search was made for the purpose of enforcing State law by State officers without Federal participation.

I entertain the view that the admissibility or nonadmissibility of the evidence in a Federal Court does not diminish one whit the inherent obligation of a State Court to correct the abuse of its process.

Reluctant though I be, I conceive it to be my duty to redress so far as it is within my power the Constitutional [fol. 555] wrong done the plaintiffs herein through the abuse of the State Court's own process by granting the plaintiffs herein the injunctive relief which they seek in this proceeding.

Rea v. *United States*, 350 U.S. 214, 100 L. Ed. 233.

[fol. 556]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

JAMES BUTLER ELKINS, and
RAYMOND FREDERICK CLARK, Plaintiffs,

—vs.—

GEORGE MINIELLY, TERRY SCHRUNK, HAL LYNN, GARTH STACKHOUSE, RICHARD SACANTI, ARTHUR HEEM, WILLIAM M. LANGLEY, ROBERT Y. THORNTON, VAYNE GURDANE, CLAUDE CROSS, F. O. MAISON, HOWARD LONERGAN, OSCAR HOWLETT, and other State or County officials unknown to plaintiffs, Defendants.

TEMPORARY RESTRAINING ORDER

The above entitled matter having come on for hearing before the undersigned Judge of the above entitled Court pursuant to an order to show cause heretofore issued herein, plaintiff James Butler Elkins appearing in person and by Walter H. Evans, Jr. of his attorneys, and plaintiff Raymond Frederick Clark appearing in person and by W. J. Crawford and Burton J. Fallgren, his attorneys; the defendant George Minielly appearing in person and by Oscar Howlett, Deputy District Attorney, and the defendants Hal Lynn, Garth Stackhouse, Richard Sacanti, Arthur Heem, William M. Langley and Oscar Howlett appearing by Oscar Howlett, Deputy District Attorney, the defendant Howard Lonergan appearing in person, and the defendants Vayne Gurdane, Claude Cross, F. O. Maison and Robert Y. Thornton appearing by Robert Y. Thornton, Attorney General of the State of Oregon, and the defendant Terry Schrunk appearing in person and by Clifford Alderman, his attorney, and said defendant having been excused from attendance in the Court on the assurance that he would be advised by his counsel of any orders entered herein, and the appearance having been entered and counsel for plaintiffs having moved to dismiss as to defendant [fol. 557] Howard Lonergan upon the representation of said Howard Lonergan that he had not been subpoenaed in Federal Court, knew nothing about the matter, and would communicate with this Court in the event he were so subpoenaed and the Court having allowed such dismissal and the matter having thereupon been heard upon statements of counsel upon certain facts which were matters of record in this Court and not disputed, and the Court being desirous of having more time to consider the matter, and the Attorney General of the State of Oregon having requested more time to consider the matter in order to present authorities to the Court, and

It appearing to the Court from the motion and affidavit in support thereof and the verified complaint on file herein and on the records and files of this Court and of the facts agreed to that irreparable injury may result to the plaintiffs in the event a restraining order not issue herein and

it further appearing to the Court that the plaintiffs have tendered a corporate surety bond in the penal sum of $250.00 and said bond has heretofore been approved by the Court, which said bond provides that plaintiffs will pay all costs and disbursements that may be decreed to defendants, or any of them, and such damages not exceeding the sum of $250.00 as any defendants may sustain by reason of the temporary restraining order if the same be wrongful or without sufficient cause.

Now Therefore, it is hereby Ordered that the defendants named above, save and except the defendant Howard Lonergan, and all other State and County officers or officials having knowledge of this order, and each of them, be and they hereby are restrained and enjoined from:

1. Giving testimony in the United States District Court for the District of Oregon or in any other Court in any trial upon United States Indictment No. C-18321, or any other indictment which may be returned against the plain-[fol. 558] tiffs as defendants therein with respect to (a) any of the matters surrounding and concerning the alleged illegal search and seizure of May 17, 1956, in the premises of the plaintiff Clark at 2409 S. E. Main Street, Portland, Oregon, at approximately 10:00 o'clock p.m.; (b) from giving testimony with respect to any of the items allegedly illegally seized in said search and particularly any tape or wire recordings or a minifon wire recorder or the spools containing such tape or wire seized at or about said time and place; (c) from giving any testimony concerning any alleged copies of such tapes or recordings which purport to be copies of the originals of such tape and/or wire recordings and the existence, contents, substance, purport, effect or meaning of any communications contained thereon; and (d) from giving any testimony concerning any transcripts or statements purporting to be a reduction to writing of the sound waves recorded electronically and magnetically upon such wire or tape recordings; and

2. Revealing to any federal officers, agents of the FBI or any other persons whomsoever, the contents of such tape or any of the circumstances surrounding the seizure thereof.

And it is further Ordered that this restraining order shall remain in effect until further order of the Court, and the matter is set for further hearing at 9:30 o'clock A.M. on Thursday morning, April 18, 1957, subject to the ability of counsel to attend thereat.

Dated this 15th day of April, 1957.

CHARLES W. REDDING, Judge.

A True Copy

Walter H. Evans, Jr., Attorney for Plaintiff Elkins.

[fol. 361] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Undocketed

In re Petition of JAMES BUTLER ELKING and RAYMOND FREDERICK CLARK, Petitioners, for a stay to enable the filing of a petition for Writ of Prohibition.

PER CURIAM ORDER ON MOTION TO STAY—April 22, 1957

Before Stephens, Pope and Lemmon, Circuit Judges.

PER CURIAM:

Petitioners seek an order in effect granting a three day stay of proceedings in a criminal prosecution against them now going forward in the United States District Court of the District of Oregon, so that petitioners may have time to prepare and present here a petition for writ of prohibition to prevent the said District Court from receiving in evidence during trial of that case, certain tape recordings, and evidence concerning their import. We have heard argument on this application, and we necessarily inquire, initially, whether we may or should entertain an application for a writ of prohibition if and when such an application is presented.

The prosecution in the District Court is for violation of the federal wiretapping statute, Title 47, §605. Prior to the federal indictment petitioners were charged with a similar offense under the laws of Oregon. Those State proceedings were instituted when a State search warrant was issued and executed, and in the process of search of petitioner Clark's residence certain tape recordings were found. Petitioners promptly moved in the appropriate [fol. 562] Oregon court to suppress this evidence, and the motion was granted in the State court and the tapes in question were ordered delivered to the State Attorney General subject to the order of the court. They were placed by him in a bank for safe keeping.

Thereafter the F.B.I., through search warrant, procured possession of these tape recordings from the bank, and the indictment and prosecution in the federal court followed. These petitioners then went into an Oregon court and procured an injunction against the State and County officials who participated in the original procedure whereby the tape recordings were seized, restraining them from testifying or producing evidence relating to those recordings in the federal court. The injunction of the State court was issued upon that court's stated view that it was its duty thus to prevent the State agents from using the fruits of their unlawful acts by which they have illegally searched the premises of a person entitled under Oregon law to protection against such searches and seizures. In this respect the action of the Oregon court resembled that ordered in Rea v. United States, 350 U.S. 214. It cited that case in its decision.

It is here alleged that notwithstanding the action of the Oregon courts mentioned, the Judge of the United States District Court, who has rejected petitioner's motion to suppress the tape recordings, is about to receive the same in evidence, and to compel the State agents to testify concerning them, and will do so unless the writ of prohibition is granted. It is conceded that an unlawful seizure by State officers, not participated in by federal officials, does not render the thing seized inadmissible in the federal courts. Feldman v. United States, 322 U.S. 487, Wolf v. Colorado, 338 U.S. 25. But we are urged to grant this

[fol. 563] relief upon some principle akin to comity between State and Nation which should require the federal courts to reject the fruits of the State officials' violation of state law.

We are aware of no authority which permits us to base an order on that principle here. The writ of prohibition is a discretionary one, which should be sparingly issued in exceptional cases only, and only when required in aid of our appellate jurisdiction. La Buy v. Howes Leather Co., 352 U.S. 249, Roche v. Evaporated Milk Association, 319 U.S. 21. The prospective witnesses who though enjoined by the State court may be subpoenaed by the federal court, are not the complaining parties here. As for the petitioners, their right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence. We are not now required to express any view as to their rights in that respect. Since we are of the view that a writ of prohibition may not be issued, the application for a stay is denied.

Albert Lee Stephens, Walter L. Pope, Val M. Lemmon, United States Circuit Judges.

[fol. A]

In United States District Court
District of Oregon

Criminal 18321

The United States, Plaintiff,

—vs.—

James Butler Elkins and
Raymond Frederick Clark, Defendants.

Transcript of Proceedings

Before Honorable William G. East, U. S. District Judge.

U. S. Courthouse; Portland, Oregon, April 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 29, 30; May 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11, 1957.

APPEARANCES:

Messrs. C. E. Luckey, U. S. Attorney for the District of Oregon, and James Morrell, Assistant U. S. Attorney, representing the Plaintiff.

Messrs. William J. Crawford and Burton J. Fallgren, Attorneys, representing Defendant Clark.

Mr. Walter H. Evans, Attorney representing Defendant Elkins.

(Whereupon, the following proceedings were had:)

* * * * * * *

[fol. 2]

STATEMENT BY THE COURT AND COLLOQUY

The Court: Now, since it appears to the Court as a matter of record that the contemplated action by the State court of yesterday has now been accomplished, this Court wants to deal further with that facet of the matter which was a ground for continuance of this cause.

[fol. 3] It now appears that the Circuit Court of the State of Oregon for the County of Multnomah in a matter pending before that Court being Civil in nature and entitled James Butler Elkins, and Raymond Frederick Clark, Plaintiffs, vs. George Minielly, Terry Schrunk, Hal Lynn, Garth Stackhouse, Richard Sacanti, Arthur Heem, William M. Langley, Robert Y. Thornton, Vayne Gurdane, Clause Cross, F. O. Maison, Howard Lonergan, Oscar Howlett, and other State or County officials unknown to plaintiffs, Defendants—this Court will take knowledge of the similarity of names set forth in that title with the names appearing in the record before this Court and will further note that the order is entitled Temporary Restraining Order. And, after recital purports to order as follows: "Now, Therefore, it is hereby Ordered that the defendants named above, save and except the defendant Howard Lonergan, and all other State and County officers or officials having knowledge of this order, and each of them, be and they hereby are restrained and enjoined from:

"1. Giving testimony in the United States District Court for the District of Oregon or in any other Court in any trial

upon United States Indictment No. C-1832 or any other indictment which may be returned against the plaintiffs as defendants therein with respect to (a) any of the matters surrounding and concerning the alleged illegal search and seizure of May 17, 1956, in the premises of the plaintiff [fol. 4] Clark at 2409 S. E. Main Street, Portland, Oregon, at approximately 10:00 o'clock p.m.; (b) from giving testimony with respect to any of the items allegedly illegally seized in said search and particularly any tape or wire recordings or a minifon wire recorder or the spools containing such tape or wire seized at or about said time and place; (c) from giving any testimony concerning any alleged copies of such tapes or recording which purport to be copies of the originals of and the existence, contents, substance, purport, effect or meaning of any such tape and/or wire recording; and (d) from giving any testimony communications contained thereon; concerning any transcripts or statements purporting to be a reduction to writing of the sound waves recorded electronically and magnetically upon such wire or tape recordings; and

"2. Revealing to any Federal officers, agents of the F.B.I. or any other persons whomsoever, the contents of such tape or any of the circumstances surrounding the seizure thereof.

"And it is further Ordered that this restraining order shall remain in effect until further order of the Court, and the matter is set for further hearing at 9:00 o'clock a.m. on Thursday morning, April 18, 1957, subject to the ability of counsel to attend thereat.

"Dated this 15th day of April, 1957." "A True Copy by Walter W. Evans, Jr.," an attorney of this court and appearing herein which this Court accepts.

[fol. 5]

Mr. Evans: I believe the time was 9:30 rather than 9:00 A.M., Your Honor. Your Honor read 9:00 and if that—

The Court: If I said 9:00 it is 9:30. Thank you.

Mr. Evans: I should also advise the Court that although Howard Lonergan's name appears as a party it was dis-

missed as to him on certain representations he made at the time.

The Court: Yes. I noticed he was mentioned.

Now, since the matter was called to the attention of the Court at the suggestion of Judge Redding yesterday that he anticipated this order this Court has given the matter considerable thought in determining what the proper course, proper procedure for this Court to follow in view of the avowed action of the Circuit Court of Multnomah County. So, it does not come as first impression this morning. But I assure the record that it is only after considerable thought, and I have reached this firm conclusion that the order just read so far as it attempts to interfere with the process of this Court here before issue is void and is a nullity and of no force and effect.

This Court makes that conclusion upon analysis of the jurisdiction of the respective courts involved. Since the adoption of the Constitution of the United States of America and its original amendments there has been co-existent throughout the several states of the United States of America two separate judiciaries: one being the judiciary of the United States of America: the other judiciary of the United States of America; the other judiciary being the judiciary of the sovereign states of the several states of the United States of America. Those two judicial tribunals created under the respective Constitution of the United States on the one hand and the constitutions of the respective states involving the acts and the laws of the legislative branches of each of those two sovereign governments has worked side by side. They have worked in each of their respective spheres of action one not encroaching upon the other. That is to say that state courts have no jurisdiction or corrective processes with regards to the Federal courts and the Federal courts have no corrective or appellate jurisdiction or review jurisdiction or process over the state courts save and except that under the overriding Constitution of the United States of America the Supreme Court of the United States of America has had appellate jurisdiction and authority to correct state court orders not based upon whether or not the state court acts within its own sphere of action but

based upon the premise that the action of the state court taken was violative of the Constitution of the United States.

Article VI, Clause 2 of the United States of America which the State of Oregon adopted and held its sovereign being amenable to when it sought and was admitted to the [fol. 7] United States of America as a member state thereof reads, "This constitution and the laws of the United States which shall be made in pursuant thereto, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Pursuant to that authority in the Constitution the Congress of the United States, amongst other activities, and in enforcing the sphere of law left to its jurisdiction has provided by the following enactment, Section 2283 of Title 28 of the United States Code: "The court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress or where necessary in (a) aid of its jurisdiction or to protect and effectuate its judgments." And admonition to this court as a District Court of the United States sitting within the District of Oregon that it has no authority to anywise interfere with the processes of any State court of the State of Oregon unless that State court attempts by its processes to interfere with its jurisdiction, its processes, and the enforcement of any of its orders. I know of no authority granted under the laws of the United States of America nor of the State of Oregon that makes the State court, particularly, the Circuit Court of the State of Oregon for Multnomah County [fol. 8] the watchdog of the United States District Court for the District of Oregon.

Any litigant before this Court either on the civil side or the criminal side has a right of review either in the position that his constitutional rights have been violated or the position that this Court in its administration has committed error of law in the course of litigation before it.

The first step of appellate review is that of the Circuit Court of Appeals for the Ninth Circuit and not the Circuit

Court of the State of Oregon nor the Supreme Court of the State of Oregon. The ultimate right of review of action in this District Court is by the Supreme Court of the United States sitting in Washington.

I have endeavored to reach the sphere and determine the sphere of action of this court within the framework of the law as we know it based upon a study of the decisions of the Supreme Court that have been handed down and are our directives in the matter by reason of the fact that these two courts are engaged in one ultimate purpose in the orderly, in the speedy, and in the judicial determination and adjudication of all of the litigation that is properly brought before it side by side in the community in the State of Oregon.

It most certainly would ill behoove this Court if it deemed that the State courts were infringing upon somebody else's rights that it would exercise its equitable jurisdiction and [fol. 9] set itself up as the watchdog of the Circuit Court of the State of Oregon and use its process to enjoin and prevent orderly litigation in the State courts based solely upon the ground that this Court thought that the State court would not protect the rights of the litigants before that court. And I take it from the announcements in open court of the State court that that is the basis upon which its decision was made.

I am advised that the court had into consideration before it—

Mr. Evans: May it please the Court—

The Court: Yes.

Mr. Evans: —anything I said—lest this Court believe that the reason for Judge Redding's decision was on the ground that this Court would not protect the rights of the defendants—I was in error.

The Court: Well, I will—

Mr. Evans: I will be glad to explain.

The Court: I will let the record in the State court speak for itself and this record will speak for itself, Mr. Evans.

Mr. Evans: Thank you, Your Honor.

The Court: Thank you.

There was presented to the State court the United States Supreme Court decision in the case of Rea against

[fol. 10] the United States which I take it to be the legal basis upon which the Circuit Court deemed its authority for issuing the order. And the Court will discuss that case in a moment.

Without seeking reference further as to the Supremacy Clause of the Constitution until later, the respective judiciaries during the course of history and in their various litigations; that is, the State on the one hand and the Federal Court on the other hand, have gotten along without any real serious conflicts during history until the time of the Civil War and thereafter when there was great feeling upon various State rights in connection with the exercise of their police power and, particularly, in the initial stages of the Civil War in dealing with the slaves as property. And that is during the course of history where it was ultimately decided and the background of all of our real cases involved plant the supremacy in the United States of America when there is a conflict.

Now, in analyzing this problem, first, this Court is of the opinion that there is no particular conflict between the jurisdiction of the State court and the jurisdiction of this Court. Now, we have this situation before us. In the matter before us we are dealing with the indictment returned by the Grand Jury of this district alleging a violation of laws enacted by Congress. During the course of these proceedings there was presented to the Court a motion to [fol. 10] suppress certain objects that the defendants deemed would be used as evidence in connection with the State's case in its attempt to prosecute the alleged charges. The Court heard that matter and this seemed to be what developed from the undisputed evidence: that on or about May 17th last State officers armed with what appeared to be a valid search warrant searched the premises of one of the defendants in this cause and in the course of the search found and obtained and took possession and gained knowledge of certain articles which they seized under the purported search warrant and left the premises and then exercised jurisdiction over them. Thereafter the District Court for Multnomah County, the State of Oregon in a matter then pending before it where it was claimed that

those selfsame articles, amongst others in which we are not interested, were illegally seized by the State officers; now, bear in mind, not under the Constitution of the United States but under the provisions of the Constitution of the State of Oregon. And that court, in my opinion, rightfully said: "That is true. There was an illegal search and seizure and the jurisdiction of this court is to return those articles to the defendants." That court did not return the articles to the defendants but placed them in the possession of the Attorney General of the State of Oregon who neither and ex-facto was not exercising any jurisdiction whatsoever or authority as a Deputy Sheriff of the County of Mult-
[fol. 12] nomah. His authority in the matter was that he had received an order from the Governor of the State of Oregon to assume the duties of the District Attorney in and for Multnomah County in the course of conducting certain investigations, handling the matters and affairs of the District Attorney's office in regards to matters set forth in the Governor's order.

Subsequently the Grand Jury of Multnomah County returned an indictment against the interested parties, charged them with violation of a State law, not a Federal law, whereupon those interested parties appeared before the Court before whom that indictment was returnable and again sought possession of the articles and an order of the Court suppressing the same as evidence in any cause that might be pending before them. And that Court, in my opinion—this Court's opinion—rightfully said "You are right. It was an illegal search and seizure in violation of the Constitution of the State of Oregon; not the United States of America, but the Constitution of Oregon and this court will suppress those articles in the indictment, those articles in the indictment returned in this court. However, you can't have them back and I give them to the Attorney General of the State of Oregon," who thereupon delivered them, put them for safekeeping in the custody of the State Police of the State of Oregon who, in turn, put them in the custody and safekeeping of a private bank in what is generally known as a safe deposit box.

[fol. 13] Following the initial search and seizure on May 17th and on May 18th through advice of the newspapers,

special agents of the Federal Bureau of Investigation for the District of Oregon were apprised the first time of the contemplated raid or the fact that there had been a raid or that any articles were taken. On the following Monday or, possibly, Tuesday the then Sheriff of Multnomah County called the special agent in charge of the F.B.I. office in Portland and advised him in effect that they had some articles that appeared to the Sheriff—in effect, the Federal Government might have some interest in. Furthermore, asked their cooperation in connection with the State charge. Whereupon Special Agent Sherk went to the Sheriff's office and viewed the articles. No further action was taken by any Federal officer until about August 13th at which time upon advice from the State officers, so far as the record is concerned, freely given, a special agent was shown the articles in the safety deposit box who in turn sought—and this Court determined that it was not necessary to determine whether or not he properly sought or in fact did obtain a lawful search warrant, it being unnecessary to the matter at hand for the Court to make that decision.

In any event, the agent was armed with what purported to be a valid search warrant. And, on the day of September 5th, as I recall, the special agent with the apparent co- [fol. 14] operation, at least there was most certainly no force used by the agent in exercising what purported to be a valid search warrant, obtained possession of the articles. So, then, as the Court has reviewed in due time an indictment was returned in this Court and the interested parties sought a suppression of the articles of evidence. So, then, this Court was confronted with a single proposition: was the raid—I used the word "raid." I should say: was the search and seizure conducted by the State officers and officials on May 17th violative of the defendants' constitutional rights under Article IV of the Constitution of the United States, not for the State of Oregon. This Court does not operate, it has no jurisdiction except in certain classes of cases of which this is not one to be concerned about the provisions of the Constitution of Oregon.

This Court in this type of matter is concerned with the laws of Congress and the decisions of the Supreme Court

of the United States. So, its chore was to hear the evidence just the same as the two State judges did and reach an adjudication as to whether or not that search and seizure was violative of the defendants' constitutional rights under the Constitution of the United States. The Court concluded that it was not upon the grounds of which the Court will reiterate for emphasis. If the defendants are aggrieved by that order they have a most expedient and if they be without funds a right that was not granted in [fol. 15] the State of Oregon, by the way, until a year or so ago, to prosecute their appeal and correct this Court by review in the Court of Appeals of the Ninth Circuit.

Now, the reason why this Court determined that that search and seizure referred to was not violative of the defendants' constitutional rights under the Federal Constitution was based upon a number of decisions of the Supreme Court of the United States, the Court of Appeals of this Ninth Circuit, the Court of Appeals of some several other circuits within the United States. And it is based upon this simple proposition: that if the Federal authorities had no hand and played no part in the raid on May 17th their hands are clean and they are in nowise tainted with the illegal search conducted by the State officials. And if at a later time they obtain knowledge from some other source of the existence of objects which they conclude would tend to be evidence in connection with the charge against some person violative of the laws of the United States and they obtain possession of those articles it is not an illegal search and seizure under the Fourth Amendment of the Constitution.

In that argument able counsel—very able counsel for the defendants urged a minority opinion which they claimed tends to explain the majority opinion of the case of Lustig [fol. 16] against United States tried, decided by the Supreme Court and reported in 338 U.S. Counsel and the Court agreed as to the meaning as to the holding of the majority in that opinion. And for emphasis we review and point out the facts in that case. A secret-service agent of the United States obtained some information that he thought that the defendants had in their hotel room: paraphernalia for counterfeiting of currency, or counterfeited

currency. And that agent told the State officers about it. So, thereupon, the State officers went to the room, made an illegal entry of the room, and conducted an illegal search. They opened the drawers and went about the effects and put out on the dresser or table the articles that they had found in their search whereupon they called the secret-service agent and he went to the room and he said in effect, "This is what I want; that I don't want," and so on, and made selections of the articles that he desired for his attempted prosecution.

The search had not been completed and most certainly the seizure hadn't been made or effectuated and the agent of the Federal Government played an important part in that seizure. And the Supreme court rightfully said he had a hand in it and he became so affected with the contamination of the illegal search that the goods were tainted and was violative of the defendant's rights under the Fourth Amendment to the Constitution.

[fol. 17] Then a majority opinion said, in effect, having reached this conclusion it is not necessary for us to decide and, therefore, we leave open the question as to whether or not an illegal search and seizure by State officials so corrupts the fruit of the seizure that it is thereafter forever suppressed under either the State Constitution or the Federal Constitution and that no Federal agent can thereafter obtain that evidence for use in a criminal prosecution.

Mr. Justice Murphy, which was in line with his thinking of the matter, particularly, in the case of Wolf against Colorado decided on the same day again expressed his opinion and said that "the Court should have not left that question open, the Court should have decided the way I think and should have held that that search and seizure also violated the Fourth Amendment to the Constitution as well as the State Constitution when it was made." And three other justices concurred with him. So, we have that 5-to-4 decision of which this Court had to determine what would be the action of the Supreme Court if that question was presented to it.

This Court feels that so far as an illegal search is possible and the time involved this is a case that presents

that question palms up and straight in the face. If it goes to the Supreme Court it will be for them to decide.

Now, in the same line of thinking of Mr. Justice Murphy he wrote the majority opinion in the cause of Rea—I will [fol. 18] stand corrected on that. It was Mr. Justice Douglas that entered the opinion but was concurred in by the Justice mentioned and three other members of the Court giving it a 5-to-4 decision in which Justice Harlan, Reed, Burton, and Minton, dissent. And I am advised that is the case upon which the Circuit Court of the State of Oregon for the County of Multnomah concluded was binding upon it and applied the doctrine of that case in reverse order in issuing its temporary injunction referred to.

Now, here was the situation in the Rea case. A Federal narcotics agent conducted a search and seizure and obtained drugs which, by the way, were contraband under the laws of the United States of America and many of the states. In the instant case the articles moved against are not contraband. The defendant in that cause appeared in the District Court of the United States and sought to have the articles seized in the illegal search by the Federal officers suppressed as evidence in the case pending in court on the grounds that no probable cause existed and that the affidavit was not based on sworn statements.

The District Court granted the motion to suppress and on the Government's later motion dismissed the indictment. There was no motion made for the return of the evidence because the Court stated that was contraband. Now, after the District Court suppressed the evidence a Federal nar- [fol. 19] cotics agent on his own motion swore to a complaint before a New Mexico judge and caused a warrant for Rea's arrest in a State case. He was charged with being in possession of marijuana in violation of the New Mexico law and then awaited trial in the State court. And he sought relief in the Federal court and asked that that Federal agent be restrained by the Federal court from giving testimony in the State court.

The Supreme Court points out this: "The briefs and the oral argument have been largely devoted to constitutional questions. It is said, for example, that while the Fourth

Amendment as judicially construed would bar the use of this evidence in a Federal prosecution" citing Weeks against United States—"our decision in Wolf vs. Colorado would permit New Mexico to use the evidence in its prosecution of the petitioner. Moreover, it is said that to suppress the use of the evidence in the State criminal proceedings would run counter to our decision"—it cites a case. The Supreme Court said: "We put all the constitutional questions to one side. We have here no problem concerning the interplay of the Fourth and the Fourteenth Amendments nor the use which New Mexico might make of the evidence. The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law. The only relief asked is against a federal agent, who obtained the property as a result of the abuse of process issued by a United States [fol. 20] Commissioner. In this posture we have then a case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies. A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. The power of the federal courts extends to policing those requirements and making certain that they are observed. No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court. To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them." Now, this Court is bound by that majority opinion regardless of how strong the arguments of the dissenting justices may be. They are not directives to this Court. Let us analyze the difference between that factual situation and the factual situation that we have before us. The records of this case show not that a State officer had come to this Court. And while we are advised from the record by a question that was presented to one of the witnesses that a State officer did attempt to file a complaint in this Court, it was rejected. These proceedings do not come on by the activity of any State officer, they come on by the initiative, the action of

[fol. 21] the F.B.I. agents, the Federal Grand Jury of this district, and the processes issued by this Court initiated in that manner. The record also shows that prior to the institution of the proceedings in the State Court there was issued by this Court to some of the individuals named in that restraining order a subpoena, a process of this Court commanding those persons to appear here at the time fixed for the trial and not upon their own initiative but under compulsion of contempt process of this Court to give testimony of facts and evidence that they had in their possession.

True, some of that evidence and facts and knowledge may have been obtained by them in action violative of the defendants' rights under the State Constitution; nevertheless, under the decision of the Supreme Court of the United States and a factual situation determined by a Federal Court was not in violation of the Federal Constitution nor the defendant's rights thereunder.

So, what do we have in the Rea case? We have the Federal Court telling one of its officials, "You shall not take it upon yourself to produce evidence that you cannot produce in our courts to a state court. And you forever hold your peace." Now, let us assume in the State court of New Mexico it was not the Federal narcotics agent who went to the State Court but it was a sheriff in and for the county or the district attorney in and for the County [fol. 22] of New Mexico wherein the situation was involved and had read in the newspaper the day following the raid that the Federal agent had conducted a search and obtained marijuana in the possession of the named party and then that sheriff sat by and kept an ear to the ground and eventually became in lawful possession of that marijuana and he took that marijuana to his grand jury and said, "Here is what I have legally obtained under the laws of New Mexico, consider it, and return such indictment whether true bill or not true bill as you shall find." The grand jury of that county returned its indictment whereupon the court started the processes and brought before it the defendant, admitted him to bail, proceeded in an orderly manner to prosecute its case, issued its subpoena to the Federal agent, and said, "Come in. Help us enforce

our laws under compulsion or contempt if you fail to do so." And then have a District Court say, "No, Mr. Agent, you shall not go and testify. You are enjoined." There is where we have the situation that neither the Federal courts can dictate to the State courts nor can the State courts dictate to the Federal courts what shall be a rule of evidence in their respective cases. You have supervisory powers to correct your mistakes in that regard. And there develops that interesting line of cases that is best pointed out—now, take the case before me, Schwartz against Texas. Schwartz was charged with a crime against the laws of [fol. 23] the State of Texas. And it appears that during the investigative process of the State officers they obtained evidence by use of wire tapping. So, when they came about to present that evidence in the State court the defendant said, "No. You cannot produce that evidence against me because it is in violation of Section 605 of Title 47, United States Code. And the Federal courts will not permit that to be used as evidence in their cases. Therefore, the Fourteenth Amendment protects me and you must treat that evidence as wrongfully obtained against the laws of the United States and, therefore, you cannot use it in your state court." The State court rejected the contention, Schwartz was convicted, and he appealed to the Supreme Court of the United States claiming that his rights under the Fourteenth Amendment were violated; furthermore, his rights under the Fourth Amendment of the United States Constitution were violated because that was an illegal search and seizure under the Federal law. Here is what the Supreme Court had to say about it: "Although the intercepted calls would be inadmissible in a Federal Court it does not follow that such evidence is inadmissible in the State Court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is, none the less, admissible in the state courts" and cites Wolf against Colorado. "While such evidence, if obtained by a federal officer, would be clearly inadmissible [fol. 24] in a federal court." Whereupon the Supreme Court said: "We hold that Section 605 applies only to the exclusion of federal court proceedings of evidence obtained

and sought to be divulged in violation thereof. It does not exclude such evidence in a state court proceedings. Since we do not believe that congress intended to impose a rule of evidence on the state court we do not decide it." And there about put into effect the same line of reasoning that was adopted in a similar situation in Stein against New York where Stein had complained that the confessions obtained from him would have been held bad under Federal law were held good under the State of New York law. And here is what the Supreme Court said about it: "The petitioners confuse the more rigid rule of exclusion which in the exercise of our supervisory powers we supervise the action of our officers, and that is more rigid—that we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment." In other words, the Court held that, "Maybe our standards are higher than even that required by the Fourteenth Amendment." "This we have held did not impose rules of evidence on state courts which bind them to exclude a confession because without coercion it was obtained while the prisoner was uncounseled and illegally detained. Such confession would have been bad under federal law." State law says it was not bad, the Supreme Court refused to interfere.

[fol. 25] So, there we have our dictates. We have our dictates that these two jurisdictions shall go about their business, handle the litigation properly coming before them within their sphere of action, execute their processes, enforce their judgments, without interference one from the other. Let them adopt their own rules.

So, if that be not sufficient to show that this Court has the initial chore and burden to determine what shall be the proper rules of evidence, it errs and there is ample ground for review. If that be not enough under those decisions to show that the Congress was just as strong in prohibiting State courts from dictating to Federal courts what shall be a rule of evidence as it does for dictating to the Federal courts that they cannot influence the State courts as to what shall be their rules of evidence so long as it does not violate the rights of the defendant under the Fourteenth Amendment, not the prerogative of the

District or Circuit Courts of the United States but vested in, alone, the United States Supreme Court—if that not be sufficient then we turn most certainly to the Supremacy Clause. The Court has read that. When the spheres of action of the two courts conflict either by act of Congress, the acts of State Legislatures, there is an irreconcilable conflict, then the act of Congress must prevail. And, so, it follows from the decisions of the courts of last resort in [fol. 26] the two respective spheres when they come in irreconcilable conflict Federal judiciary must prevail under the basic constitution.

So, this Court is placed in the position of determining and setting about—it has the chore of sawing its own wood and in determining its course as to conclude what its course would be, set its sails, and go forward. Therefore, I have reached the conclusion that if it determines that there appears to be an irreconcilable conflict during the proceedings between any process of this Court and of any State court it must necessarily follow for the reasons given that the processes of this Court must stand superior.

So, I make that statement more in line with the fact of the motion for continuance to advise counsel upon the basis why this Court now abides with its decision of yesterday to grant no continuance.

• • • • • • • •

[fol. 54] Mr. Evans: Mr. Luckey, to save all this popping up and interruption, do you object to an agreement [fol. 55] what when either defendant makes an objection it should be taken for both unless the other one dissents? Or do you object to that kind of an arrangement?

Mr. Luckey: Unless it has some particular application under the circumstances to the particular defendant to which we might be able to delineate—

Mr. Evans: Yes. Well, that would save this continual 'me too' that we run into in that situation. Is that satisfactory with the Court?

The Court: It is with the Court. And, I suppose that if I am not caught unawares, if I have any other thoughts about it I can ask you.

Mr. Evans: Fine.

Mr. Crawford: Of course, it would not be excluding

either of the defendants that if they had any new, different, or additional grounds on the objection they could also make their objection at that time.

The Court: Yes.

* * * * * * *

[fol. 100] Ronald E. Sherk, produced as a witness in behalf of the Government, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Luckey:

Q. Mr. Sherk, you are a special agent of the Federal Bureau of Investigation, are you not?

A. Yes, sir.

Q. Did you come into possession of certain tape recordings in September of 1956?

A. Yes, sir; September 5, 1956.

Q. Where did you come into possession of those tape recordings?

A. At the First State Bank of Milwaukie; Milwaukie, Oregon.

Q. How many tapes did you obtain?

A. Five reels recorded on both sides.

Q. Now, is the reel that is presently in the courtroom on Mr. Endicott's machine who has been—Mr. Endicott having been called by the defense as an electronics expert, one of the tapes that you obtained at the State Bank of Milwaukie?

A. It is.

Q. Have they been in your custody since they were obtained by you from the State Bank?

A. Yes, sir.

Mr. Luckey: That's all.

[fol. 101] The Court: Has the reel been marked at all?

Mr. Sherk: Yes, sir.

The Court: And what was the number designation?

Mr. Sherk: It is marked arbitrarily just for purposes

of designation as number one. No. I beg your pardon. Just my mark.

The Court: It is your mark appearing thereon?

Mr. Sherk: Yes.

The Court: Is there space on it to put a sticker? Or, what can we—

Mr. Sherk: A small sticker could be attached to the reel, Your Honor; very small.

The Court: It will be Government's Exhibit 1.

(At this point a roll of electronic recording tape on a reel was marked for identification as Government's Exhibit 1.)

The Court: Yes, you may inquire.

Mr. Morrell: We may have one or two more questions.

The Court: Oh. Fine.

By Mr. Luckey:

Q. The tape was enclosed in a book, was it not?

A. Yes, sir.

Q. Was there a slip of paper in the box?

A. Yes, sir.

[fol. 102] Q. Was that slip of paper in the box when you got the tape and box?

A. It was.

Q. Both the box and the paper are present in the courtroom with you, are they?

A. Yes, sir; I have them in my pocket.

Mr. Luckey: Thank you.

Q. That particular tape was in the box which is in your pocket?

A. Yes, sir.

The Court: The reel which has been referred to has been marked—and tape, Government's Exhibit 1. Now, I would like to have the box referred to marked as Government's Exhibit 1-A.

(At this point a small cardboard box, the container for Government's Exhibit 1, was marked for identification as Government's Exhibit 1-A.)

Mr. Morrell: Perhaps, Your Honor, the paper referred to should be marked Exhibit 1-B.

The Court: Thank you.

Mr. Crawford: Then, I take it the reel of tape is Exhibit 1, the box is Exhibit 1-A, and the paper, or whatever it is, Exhibit 1-B?

The Court: Yes.

[fol. 103] (At this point a small piece of note paper was marked for identification as Government's Exhibit 1-B.)

• • • • • • •

[fol. 113] Direct examination.

By Mr. Morrell:

Q. Mr. Sherk, you have now returned to the courtroom and I see that you have with you a box. Would you please identify that box and its contents, if any?

A. Well, this box contains another one of the five reels that I described in my previous testimony. And, the note was in the box when I found it, just in this condition.

Q. And, I assume from that that that was one of the boxes that you got from the bank; is that correct?

A. How is that?

Q. That's one of the boxes containing the reel and the note that you obtained from the bank?

A. Yes, sir.

Mr. Morrell: I'd like to have that reel marked as Government's Exhibit 2; the box, Government's Exhibit 2-A; and the paper referred to as Government's Exhibit 2-B.

(At this point a reel of tape, its container, and a small slip of note paper were marked respectively for identification as Government's Exhibits 2, 2-A, and 2-B.)

• • • • • • •

[fol. 115] The Clerk: I have now marked the tape as Government's Exhibit 2, I have marked the box Government's Exhibit 2-A, and I am marking the assorted pieces of paper contained in the box as Government's Exhibit 2-B, 2-C, 2-D, 2-E, 2-F, and 2-G, inclusive.

(At this point the previous parenthetical was modified to show several slips of note paper remarked as Government's Exhibits 2-B, 2-C, 2-D, 2-E, 2-F, and 2-G, inclusive, for identification.)

• • • • • • •

[fol. 119] By Mr. Morrell:

Q. Mr. Sherk, I see that you have in your hand a box. Will you identify the box and its contents, if any, please?

A. Yes. This is another item similar in all respects and in appearance to the Government's Exhibits 1 and 2 that I obtained at the same time and the same place under the same circumstances.

Q. That is one of the five tapes that you referred to previously?

A. Yes, sir.

Q. That was obtained on September 5th of 1956?

A. Yes. It's a box containing a reel of electronic recording tape and a note just like the notes in the other boxes.

[fol. 120] Q. That's the same box that tape was in at the time you obtained it; correct?

A. Yes, I think it is. This is the one that came with the box.

Mr. Morrell: I would like to have the tape, reel identified as Government's Exhibit 3; the box as Government's Exhibit 3-A, and the pages of the note if there are more than one, individually marked.

Q. Mr. Sherk, are there more than one page?

A. This one is one, I think.

(At this point a reel containing a roll of electronic tape, a box therefor, and a small piece of note paper were marked respectively for identification as Government's Exhibits 3, 3-A, and 3-B.)

• • • • • • •

[fol. 122] Mr. Morrell: Go ahead and have him mark it.

Mr. Crawford: Is that tape number four?

The Clerk: This will be tape number four.

Mr. Morrell: The box is marked 4-A and the slip of paper 4-B.

(At this point a reel containing a roll of electronic recording tape, a container therefor, and a small slip of note paper were respectively marked Government's Exhibits 4, 4-A, and 4-B for identification.)

(At this point Mr. Sherk resumed the witness stand, having been previously sworn, and testified as follows:)

[fol. 123] Direct examination (continued).

By Mr. Morrell:

Q. Mr. Sherk, is that one of the boxes containing the spool of tape and paper to which you referred previously in your testimony?

A. Yes. This is the fourth of the five boxes.

Q. And that, too, was obtained at the bank on September 5, 1956?

A. Yes, sir, in the same manner as I previously described.

Q. All right. Now, we have asked the Reporter to mark them—the tape 4, the box 4-A, and the paper 4-B. When that has been done I assume that we can begin the playing of Exhibit 4, the tape?

. . . . . .

[fol. 126] Mr. Evans: For fear of damaging the tape, with stipulation of counsel it was substituted. Call that substitute 4.

Mr. Morrell: But, keep the original reel in with it.

Mr. Sherk: This is the only one I have got. It's made that way.

Mr. Evans: Oh. It's made that way?

Mr. Luckey: Ask the expert about that.

(At this point a tape reel containing no tape was marked for identification as Government's Exhibit Substitute 4.)

(At this point Mr. Endicott, the electronic expert, proceeded to broadcast and record the tape presently on the machine.)

Mr. Evans: That's it. There wasn't anything more on [fol. 127] that.

The Court: Well, can we let the record show that record number four is returned to the custody of Mr. Sherk?

Mr. Morrell: That's been marked sub 4, the new reel with the tape off of 4.

. . . . . .

[fol. 129]

MORNING SESSION

(Court reconvened proceedings herein at 10:30 o'clock A.M., April 19, 1957, pursuant to adjournment, and the following proceedings occurred herein.)

STATEMENT BY MR. EVANS

Mr. Evans: I advised the Court, I think, last night that this morning at 9:00 o'clock was the time set by the Circuit Court of the State of Oregon for the County of Multnomah for further proceedings on the temporary restraining order and temporary injunction sought by the defendants herein as plaintiffs in the State court action Number 238-958, Circuit Court Clerk's number, entitled James Butler Elkins and Raymond Frederick Clark, plaintiffs, vs. George Minielly, et al. As I called the Court to advise, I'd be a little late. There was the calendar call with all the lawyers there and as soon as Judge Redding had disposed of that he announced that he was ready to announce his decision but that he did not have it written so that it could be distributed to counsel. But, he explained that he had had three hours sleep the last three nights and had been down with the court reporter working since 6:00 o'clock this morning and that as soon as he could he would get copies of his opinion to us. In his opinion he granted a temporary injunction against the defendants in the manner [fol. 130] prayed for—well, in generally the same language as to the restraining order except he said he wished to modify section two of the restraining order. He thought that was perhaps broader than it should be. He went to considerable pains to spell out the exact theory of why he was doing it and to explain how and why he felt that there

was no question of the Supremacy Clause or no question of his interfering with the jurisdiction of this Court.

And, I can't purport to quote all of it, but I think the basic reasoning that he expressed was this: He felt the hands of this Court were tied by the Federal rule which holds immaterial the illegality of a State search and seizure; that in other words he said if there were even discretion in this Court to vary that rule he would not entertain the restraining order. He said that because, he commented, that he was personally acquainted with the Judge before whom this was being heard and that Judge had served on the State Circuit Court and there was no question in his mind but what the Judge of this Court would do everything within his power to preserve the constitutional rights of these defendants. But, he said that under the Federal law as laid down, which he knew this Court was obligated to follow, this Court was helpless in that respect because it could not control State officers. It had no power to control State officers as such.

[fol. 131] Therefore, the only relief available would be through a State court acting only on State officers and declaring the State policy with regard to search and seizure and holding that where a State court determines a search warrant had been wrongfully issued, an abuse of process, he felt it was his duty as a Circuit Judge to correct that abuse of process and if at all possible preserve or restore whatever constitutional rights of the defendants had been invaded; and that, as he saw it, the only way that that could be done was do towards the State officers exactly what the Supreme Court of the United States did toward the Federal officers in the Rea case. In fact, he said he felt that probably if this particular Court happened to be sitting over there as a State court he would undoubtedly reach the identical conclusion because of the fact that that is the only remedy whereby the State's illegal search and seizure can be corrected.

Now, I have probably not summarized that accurately. The opinion that he read, I guess, took 20 minutes, and I can't purport to boil it all down in that length of time. But, I felt I should call that to the Court's attention.

He asked me at the first opportunity I had to prepare the appropriate form of order.

Mr. Tanner appeared for Mr. Langley and said he would like to be consulted on the form of order before it was [fol. 132] signed and the Judge said that would be all right and he would continue the present temporary restraining order in effect until the temporary injunction was issued.

Now, I realize this come up very suddenly in this Court. I feel that my appropriate procedure would be, first, to inquire as to whether or not the—well, first, perhaps, this Court would like an opportunity to study the matter or to see Judge Redding's opinion to see the reasoning that he followed. The reason I am saying this is is if this Court concludes after due deliberation that it adheres to the views previously expressed then I feel I should request a recess of the proceedings long enough to permit me to apply to the Court of Appeals for a stay for a long enough time to get a writ of prohibition. I don't know exactly, frankly, what procedure I should follow where time is of the essence, but that appeared to be to me the most feasible one. And, I certainly wouldn't want to do that without advising the Court exactly what it is.

The Court: Yes.

Mr. Evans: Now, as I say, it occurs to me it might be beneficial for all of us, the U.S. Attorney—and, I certainly would like a chance to study the remarks of Judge Redding. I have asked the reporter to get them out just as quickly as she can. Some of them, I think, were typed before so I don't know exactly how long a delay is involved. It might [fol. 133] not be a very long delay.

The Court: Thank you very kindly.

I take it that the only order that I have to deal with is the temporary restraining order on the date of April 15th.

Mr. Evans: That is continued. As I say, first I came immediately over here just as soon as the Judge approved the matter. And I will, as a matter of courtesy, give the Clerk a copy of any subsequent orders that are tendered or signed by the Circuit Court.

* * * * * * *

[fol. 134] Mr. Morrell: Does Mr. Sherk have reel number five with him?

Mr. Sherk: Yes.

Mr. Morrell: Would you produce it, and have the reel marked as Exhibit 5, the box as Exhibit 5-A, and the paper or papers in the box also marked? If there is one sheet it should be marked 5-B.

Mr. Sherk: There is one sheet.

(At this point a reel containing a roll of electronic recording tape, a box therefor, and a small slip of note paper were respectively marked for identification as Government's Exhibits 5, 5-A, and 5-B.)

[fol. 135] Roxald E. Sherk, previously produced as a witness in behalf of the Government, having been previously sworn, was examined, and testified as follows:

Direct examination.

By Mr. Morrell:

Q. Is that the fifth of the five reels and boxes containing those reels that you took into your possession on September 5, 1956, at the bank in Milwaukie?

A. Yes, sir.

Q. That is the fifth of those to which you referred in your testimony last night?

A. Yes, sir.

Q. Has that box, paper, and reel, likewise, been in your possession continuously since September 5, 1956?

A. It has.

Q. And, you brought it to court this morning, is that correct?

A. Yes, sir.

* * * * * * *

[fol. 137] Mr. Luckey: May it be stipulated that reel five which appears defective may have the same substitution as four?

Mr. Evans: Yes. It will be 5 substitute.

Mr. Sherk: Was it three that was haywire? I thought it was four.

Mr. Evans: I am quite sure it was four.
Mr. Crawford: So stipulated.
Mr. Evans: So stipulated.

(At this point a plastic reel for electronic recording tape was marked for identification as Government's Exhibit Substitute 5.)

(At this point the machines were again placed in operation and after a period of time were stopped for the noon recess.)

Mr. Luckey: Can we stipulate that Mr. Sherk has the custody of the tapes?
Mr. Evans: We will stipulate that.

* * * * * * *

[fol. 139] The Court: Let the record show that Mr. Sherk has taken physical possession of the Exhibit 5.
Mr. Sherk: 5-A and 5-B also.

* * * * * * *

[fol. 143] The Clerk: The roll of wire for use on the Minifon machine has been marked Government's Exhibit 6; the slip contained in the box which housed the roll is now Government's Exhibit 6-B; and the box which housed the roll is marked 6-A.
The Court: The box is A, the slip of paper is B.

(At this point a roll of Minifon recording wire was marked Government's Exhibit 6 for identification; a slip of paper contained in the recording-wire box was marked Government's Exhibit 6-B for identification; and the box which housed the Minifon recording wire was marked Government 6-A for identification.)

[fol. 144] RONALD E. SHERK, previously produced as a witness in behalf of the Government, having been previously sworn, was examined, and testified as follows:

Direct examination (cont'd).

By Mr. Morrell:

Q. You handed to the Clerk, Exhibit 6, 6-A, and 6-B, being, one, a roll of wire—recording wire for a Minifon wire recorder; 6-A being the box in which it was enclosed, and 6-B, a piece of paper in the box. Were those three articles taken into your possession on September 5, 1956?

A. Yes, sir.

Q. At the same bank—

A. Yes.

Q. —to which you testified earlier?

A. Yes.

Q. They have been in your possession continuously since that time; is that correct?

A. They have.

Q. I might ask you at this point, was the roll of wire and the little box in which it was contained inside of another container?

A. Yes. It was inside a container which contained other rolls of wire and a Minifon recorder and attachments.

Mr. Morrell: It might be well at this time to refer to the Minifon recorder and case as a unit unless somebody [fol. 145] has an objection to that. And, we could have that marked as Exhibit 7. That would be the case, the Minifon recorder enclosed in it, and the various pieces of wire. It's not including the other rolls of recording wire which will be marked separately. Is that satisfactory with the Court? I think that would be a way to refer to it simply.

Q. Mr. Sherk, did you take into your possession Exhibit 7, the leather case with the wire recorder in it?

A. Yes, sir; at the same time and at the same place as the previous exhibits to which I have testified.

(At this point a Minifon recorder, a leather case meant to house the recorder and various pieces of wire were marked for identification as Government's Exhibit 7.)

By Mr. Morrell:

Q. Has that been in your possession continuously since its seizure?

A. It has.

• • • • • • •

[fol. 149] Cross examination.

By Mr. Evans:

The Court: Mr. Sherk, did I understand that when you took possession of the Minifon recorder there was a reel in it?

A. Yes, sir.

The Court: Can you identify that now?

A. Yes; that is this one that's presently being marked Government's Exhibit 8.

[fol. 150] Mr. Luckey: 8. That's right.

Mr. Evans: May I tell you before you do that, Mr. Sherk—

Q. Would you tell me, were there any markings on any of the other reels? I am just trying to save time here is why I asked this now. Were there any markings on any of the other reels besides that one that said 'nil'?

A. The markings that are on the reels at the present time—markings—you mean—

Q. Or, the writings?

A. The writings that are on the reels now are exactly the way I found them. I made no additional writings on them.

Q. I see. Well, maybe I can save time here on the one to be played next. Could you tell me what the writing were on the other two? I want to—

A. May I refresh my recollection?

Q. Surely.

A. There is a slip in this one that says "Eileen Allen Ray Clark NG".

Mr. Evans: Well, that one, I think, we would like to play next if it meets with the Government's approval.

Mr. Luckey: Yes, if it may be marked.

Mr. Crawford: Let's have it marked.

The Court: It will be reel nine.

Mr. Luckey: Does it have a paper and box?

Mr. Sherk: Yes, it has a paper and a box.

[fol. 151] Mr. Luckey: The box will be A and the paper B, then.

(At this point a reel of Minifon recording wire was marked Government's Exhibit 8 for identification.)

Mr. Luckey: Box, A, and paper, B, then.

(At this point a roll of Minifon recording wire was marked for identification as Government's Exhibit 9, its container, 9-A, and a paper enclosed in the container, 9-B for identification.)

By Mr. Evans:

Q. So that the record is clear, that was on the machine when you first saw it, Mr. Sherk?

A. No. It was in the box the way it is now.

* * * * * * *

[fol. 155] By Mr. Luckey:

Q. Mr. Sherk, did you obtain an additional spool of Minifon tape at the time of your obtaining the other documents or exhibits here September 5th?

A. Yes, sir.

Q. Do you have it with you now?

A. Yes, sir.

Q. What is the exhibit number?

A. Government's Exhibit 10.

Q. That is the spool of wire, is it?

A. Yes, sir.

Q. And, is 10-A the box and 10-B—was there a piece of paper in it?

A. Yes, sir.

Q. 10-B, is that the piece of paper?

A. Yes, sir.

Q. You have had that constantly in your possession since obtaining it on September 5th?

[fol. 156] A. I have.

* * * * * * *

[fol. 164] RONALD E. SHERK, produced as a witness in behalf of the Government, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Luckey:

Q. Would you tell the Court and jury your name, sir?
A. Ronald E. Sherk.
Q. Where do you live, Mr. Sherk?
A. Portland, Oregon.
Q. What is your employment?
A. I am a special agent of the Federal Bureau of Investigation.
Q. How long, Mr. Sherk, have you been so employed?
A. Since October, 1940.
Q. Are you assigned to the Portland office?
A. Yes, sir.
Q. In the course of your duties as a special agent for the Federal Bureau of Investigation were you assigned to participate in investigation of alleged violations of Title 47, Section 605 of the United States Code pertaining to wire tapping allegedly involving the defendants Clark and Elkins?
A. Yes, sir.
Q. Now, during the course of that investigation, Mr Sherk, did you ever come into possession of any tape recordings?
A. Yes, sir.
[fol. 165] Q. When did you come into possession of those tape recordings?
A. On September 5, 1956.
Q. Where were they on that occasion?
A. At the First State Bank of Milwaukie at Milwaukie, Oregon.
Q. Have you had them in your custody and possession since that time?
A. Yes, sir; continuously.
Q. Now, have you heard those recordings?
A. Yes, sir.

* * * * * * *

[fol. 166] Q. Now, Mr. Sherk, do you recall the exhibits that were in a preliminary proceeding in this matter before the Court and after the selection of the jury marked Exhibit 1, 1-A, and 1-B?

A. Yes. Exhibit 1 was a reel of electronic recording tape.

Mr. Evans: Excuse me. This occurs to me, Your Honor, that for the record—I will be very brief—that we should interpose an additional objection on the ground that this evidence has been suppressed by the State court. I am a—

The Court: Don't you think that your record is preserved on that point?

Mr. Evans: Well, I am never sure whether it is or whether it has to be made at the time of the trial. Frankly, that's the only reason I am up at this time.

If the Court feels that we will not interpose any of those matters and then it will save a lot of interruption then.

The Court: Well, I certainly feel that way, Mr. Evans. Of course, I am not in a position to say what the record would be that's required by any review. I can understand [fol. 167] that. But, it would seem to me that you have ample protection in your record by reason of prior motions.

Mr. Evans: I am willing to accept that statement.

The Court: Because, I certainly understand your position about it as to both defendants.

. . . . . .

[fol. 171] Mr. Luckey: Your Honor, I would offer Exhibits 1, 1-A, and 1-B, in evidence as evidence of corpus delicti on the basis of the statements of the witness that they contain sounds that appear to be telephone conversation recording.

. . . . . .

[fol. 172] Cross examination.

By Mr. Evans:

Q. Mr. Sherk, you're an F.B.I. agent here?

A. Yes, sir.

Q. You're also a member of the Oregon State Bar?

A. That is correct.

Q. Now, the first time you ever saw—well, first, tell me about what these three exhibits are again so I can get them straight. What is 1?

A. One is a reel of electronic recording tape. Two is the box in which it is contained and three is a slip of paper bearing printed or written notations purporting to show [fol. 173] what is contained on the tape.

Q. You mean 1, 1-A, and -B?

A. No. 1 is the tape, 1-A is the box, and 1-B is the note.

Q. Now, you said you first heard them on May 22, 1956—or, a portion of it. I think you said you didn't hear all of it.

A. Let me be absolutely specific about that. The portion of the tapes that I heard on May 22, 1956, was a portion of the exhibit that's now referred to as Government's Exhibit 2.

Q. I see. That's what I am getting at. You actually didn't hear any parts of Government's Exhibit 1 on May 22nd?

A. No, sir.

Q. So, the first time, as far as you know, that you heard any portion of it was on September 6th, the day after they were picked up by the Government?

A. That's right.

Q. Where did you hear that?

A. In the offices of the Federal Bureau of Investigation.

Q. And, you were personally present when they were taken into possession by you under the process of this Court on the day before?

A. Yes, sir.

Q. Who else was present at that time?

A. Special Agent Joseph Dunne was with me; Captain [fol. 174] Gurdane of the State police was present, and the manager of the First State Bank of Milwaukie was present. There were also present in the bank but not participating in connection with this thing a number of bank employees and customers.

Q. You, of course, don't know the names of the latter two classes you have mentioned?

A. No, sir.

Q. Actually, where did you take possession of this, Mr. Sherk? Was it out in the front part of the bank?

A. No. I took it from a safety deposit box located in the safety deposit vault of that bank.

Q. It was actually under lock and key in a safe deposit box?

A. Yes, sir.

Q. How many keys were there to that safe deposit box?

A. It is my understanding that there were two keys.

Q. Did you have either one of those keys—

A. No, sir.

Q. —in your possession as distinguished from being present in the group?

A. No; not in my possession.

Q. All right. How was access to the box gained?

A. I presented to the bank a Federal search warrant to the manager of the bank—a Federal search warrant, and the box was opened by the insertion of one key which [fol. 175] belonged to—or, which was in the possession of Captain Gurdane and by the other key which was in the possession of the bank.

Q. Then, do I understand it, Mr. Sherk—I will try and shorten this up—that ever since that time they have either been in your personal possession or in the possession—in your office or here in court in custody of the Clerk being played the last couple of days?

A. That is correct.

. . . . . .

[fol. 176] Cross examination.

By Mr. Crawford:

Q. What is the soonest date from this date that you first saw Exhibit 1? The nearest date? When did you first see Exhibit 1?

A. To the best of my knowledge I first saw Exhibit 1 on May the 22nd, 1956.

Q. Where did you see that?

A. In the office of the Sheriff of Multnomah County; that is, in one of the offices of the Sheriff of Multnomah County.

Q. Upon what floor in the courthouse was that office?

A. It's in the criminal division. I believe it's on the eighth floor.

Q. On the eighth floor. Do you know what floor of the Multnomah County Courthouse that the District Attorney maintains his office?

A. It's several floors lower. I believe it's the fifth.

Q. Would you accept my statement that it is the sixth?

A. Yes.

[fol. 177] Q. Yes. Now, at that time did you have in your hands—I mean, manually, Exhibit 1? Did you pick it up?

A. Mr. Crawford, if you had asked me that question ten days ago I would have said I am positive that I did. But, I have since learned that one of those five reels of tape was not present with me at that time. I can state positively that I handled Exhibit 2 and that I handled three other reels of tape. But, whether the missing reel was Exhibit 1, 3, 4, or 5, I can't state under oath at this time.

Q. Is it a fair statement, Mr. Sherk, that you don't know whether or not you saw Exhibit 1 on May 22, 1956?

A. Yes; that is a fair statement, Mr. Crawford.

Q. Now, tell me, Mr. Sherk, are you sure that you saw what has heretofore been referred to in a preliminary matter as Government's Exhibit Number 2 at that time?

A. Yes, sir.

Q. Where did you see Government's Exhibit Number 2?

A. In an office of the Multnomah County Sheriff in the same place and manner that I previously described.

Q. Now, to shorten this up, in speaking about the various exhibits, properly, what has heretofore been identified as Government's Exhibits 1 to 5 with their sub-numbers on them, did that all take place in the same office at the same time, to-wit, May 22, 1956, in the office of the Sheriff of Multnomah County, Oregon?

[fol. 178] A. Yes, sir.

Q. Now, believe me, Mr. Sherk, I am not trying to trip you up or make any capital out of what you can remember or what you did remember on a previous occasion. I am only trying to find out what you did.

Now, on our motion to suppress it is my recollection that you stated during your testimony at that time that there were five reels of tape enclosed in boxes which have been marked here as Government's Exhibits 1-A, 2-A, 3-A, 4-A, and 5-A; is that correct?

A. Those are the five boxes, yes, sir.

Q. Yes. Now, I will ask you this question: How many reels of tape did you see at that time, referring to May 22, 1956?

A. Well, Mr. Crawford, it was my firm impression until a little over a week ago that I saw five. I know I saw five boxes and I thought there were five reels of tape.

Q. You saw five boxes?

A. Five boxes, yes.

Q. To the best of your knowledge and belief would these five boxes be what has been referred to here in preliminary matters as Government's Exhibits 1-A, 2-A, 3-A, 4-A, and 5-A?

A. Yes. Now, Mr. Crawford, I did not mark those boxes for identification at that time.

Q. Well, I asked you just to the best of your memory.

A. To the best of my knowledge they are the same, yes, sir.

[fol. 170] Q. Now, there is one thing that, perhaps, we can agree on, then. At that time on May 22, 1956, at that previous time and place you did see five boxes?

A. Yes, sir.

Q. So that you are sure of that. You saw five boxes?

A. That's the very best of my recollection, Mr. Crawford.

Q. It is now your recollection—and I am not making anything out of it, Mr. Sherk—it is now your recollection that at that time and place you saw five boxes but only four reels of tape; is that correct?

A. Mr. Crawford, it was my recollection that I saw five reels. But, I think if I may explain to you why I am not as sure about that as I am about matters that occurred after the tapes came into Federal hands—

Q. Very well. You may. I would like you to explain.

A. I wasn't over there to take those tapes into Federal custody or to mark them as evidence in Federal court. I was over there upon instructions of my agent in charge to listen to all of them or as much of them as the local authorities wished to play for me with a view to determining whether a violation of Federal law had taken place. Therefore, I didn't pay as minute attention to the physical details

as I would have had I been taking them into custody as evidence.

Q. Now, Mr. Sherk, on this occasion, May 22, 1956, when you heard the portion of one of the exhibits—I understand [fol. 180] it's not the exhibit that you hold in your hand?

A. No, sir; it is not.

Q. —it's Government's Exhibit 1—what time of the day did you play that tape that you did hear at that time?

A. Between 2:00 and 2:30 P.M. on May 22nd.

Q. 1956?

A. 1956.

Q. How long altogether on that occasion were you in the Sheriff's office?

* * * * * * *

The Witness: I would say from about five minutes till 2:00 until about twenty-five minutes till 3:00.

By Mr. Crawford:

Q. Forty minutes?

A. Forty minutes.

Q. Give or take five?

A. Oh, yes; give or take fifteen or twenty. But, that's my best recollection.

[fol. 181] Q. That's your best recollection?

A. Yes.

Q. Now, at that time you testified there were four tapes and five boxes. Did you place any identifying marks upon any—well, we will just confine it to Government's Exhibit 1.

A. No.

Q. Or, 1-A or 1-B?

A. No. I placed no identifying marks. If I may answer as to all of them?

The Court: You may.

By Mr. Crawford:

Q. And that goes to all exhibits from Government's Exhibit 1 through 5 with their various subdivision exclusively?

A. Yes. Yes. If I may say why I did not, it's for the

same reason that I mentioned before, that I wasn't contemplating at that time taking them into Federal custody.

Q. Now, Mr. Sherk, on the box that you have in your hand lay the note which, I believe, is 1-B to one side. Very carefully, now, remove the reel from the box, hold it up in front of you just—well, in view of the jury. Now, if you please, Mr. Sherk unreel approximately six or seven, eight, nine, inches of tape from the reel so it is visible to the jury.

(At this point the witness does as requested.)

[fol. 182] Mr. Crawford: That is sufficient.

Q. Now, Mr. Sherk, on May the 22nd, 1956, by an inspection of the tape, by looking at it, by not playing it, could you determine and state positively of your own knowledge that that tape contained anything upon it merely by looking at it?

A. No, sir. The tape looks just the same when it's blank as when it has recorded conversations on it.

Q. So, it is a fair statement, then, that at that time as far as you know that this exhibit—you did not know of your own knowledge that it contained any recordings of any kind or nature whatsoever?

A. Yes. The first time that I listened to this tape—and that is the only way that you can tell whether a tape contains conversations or not—the first time that I listened to this tape was on September 6, 1956.

Q. You're a lawyer admitted to the Oregon State Bar?

A. Yes, sir. I am a member of the Oregon State Bar.

* * * * * * *

[fol. 184] By Mr. Crawford:

Q. Now, Mr. Sherk, your own personal knowledge concerning what these tapes contained was the same up to and including the time that you actually played the tapes on September 6, 1956, was it not?

A. Yes, that's correct.

Q. On May the 22nd, 1956, you did not know any of the individuals or you did not recognize the voices of any of the individuals which purport to be recorded on Government's Exhibit 1, did you?

A. I listened to 2, Mr. Crawford, on May the 22nd.

Q. Yes. Well, I am only asking you—

A. Oh. As to Exhibit 1?

Q. Yes.

A. Mr. Crawford, I have already testified that I didn't listen to Exhibit 1. No. I testified here today that I only listened to what is referred to as Government's Exhibit 2 on May 22, 1956. So, the answer to this question would be: certainly, since I didn't listen to it I didn't recognize [fol. 185] any voices on it.

Q. It would be No, wouldn't it? The answer would be No?

A. Yes, the answer would be No.

Q. When next, Mr. Sherk, did you see Government's Exhibit 1 after May 22, 1956?

A. On August the 13th, 1956, at the First State Bank of Milwaukie, Milwaukie, Oregon.

Q. Who took you there?

A. I was admitted there by Captain Gurdane and Lieutenant Cross of the Oregon State Police.

Q. At that time did you have any process with you, a search warrant or a paper or document of like nature?

A. No, sir.

Q. I think you have covered this, but just to make sure, a short question on it. Did I understand you to say that on this particular exhibit, and referring particularly to the boxes and the reels of tape and the notes, you placed no identifying marks on May 22, 1956?

A. No, I did not, not on any of them.

. . . . . .

[fol. 191]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Now, I will hear you with reference to the offer of the exhibit in evidence by the Government.

Mr. Evans: We object to it on the ground that from the witness' own statement it appears that it is incomplete as evidence of a corpus delicti.

As I understand the Federal statute, it is only an offense when an intercepted telephone communication is di-

vulged, the interception having been without the consent of the sender.

Mr. Luckey: Obviously, Your Honor, you can't establish all the facts at one time. It's appropriate, for example, in a murder case to establish a dead body and then to prove there was violent means.

Mr. Crawford: Oh, no.

Mr. Luckey: And to prove the defendant may have done it.

The Court: Just a moment, gentlemen. One at a time.

Mr. Evans: I quite agree with Mr. Luckey's position. My point is his offer is premature because he hasn't identified it as a dead body yet. It is not evidence of a crime [fol. 192] until the elements are established.

The Court: Just a moment. I will hear your matter.

Mr. Crawford: I was going to say, Your Honor, from the very nature of this that Mr. Luckey's comparison is not good because, as I so carefully pointed out by this witness' testimony, that a mere looking at it is no evidence at all that a crime has been committed and, particularly, a crime which is chargeable under Section 605 and 501 of Title 47, U.S.C. Now, there must be something more than that. Certainly there must be other evidence to connect up this particular tape with the violation of the sections charged in the indictment.

The Court: I will hear you, Mr. Luckey.

Mr. Luckey: I certainly would submit this case would not be made upon the submission of one piece of evidence alone, but it is certainly evidence and, I think, competent evidence to establish the phase of the case that there was an intercepted communication now as to divulgence and connection of these phases with the other phases. But, this evidence is competent to establish one phase of the violation just as the dead body would be competent to establish the fact of the death. We may have other evidence of violence and you may have to have other evidence in connection with the offense.

The Court: We have this situation as has been presented [fol. 193] to the Court before in preliminary matters, that to constitute a violation of Section 605 and—referred to, of Title 47, there must be two specific elements. The jury

will be so instructed and they must have in mind—have it in mind when they listen to the evidence either whether it be in retrospection or in advance. There must be an unauthorized interception of a wire communication. There are various modes of which there could be an interception. There could be an audible interception or there could be a mechanical interception, whatever theory the prosecution would have, and that would depend upon what he claims the facts would exist, what would anticipate, in view of the theory stated under the indictments and the theory of the State as expressed to the jury that they now claim that this evidence offered tends to prove. It is up to the jury to determine whether or not it does contain an intercepted communication without any question as to whose conversation or communication it is, without any indication or even suggestion of who intercepted it and, certainly, without any suggestion or intimation that even the second element of the crime of divulgence or use is even contemplated by this.

So, I am satisfied that if it is the theory of the Government this mechanical aid, and so forth, contents can only be known by the jury hearing it, that they are entitled to receive some evidence or for whatever evidence they con- [fol. 194] clude it may be in determining whether or not there was an interception of a communication. Whose communication it is, we are not concerned with in this evidence. So, Exhibits 1 and 1-A will be received.

(At this point a plastic reel containing a roll of electronic recording tape and its cardboard container were received in evidence as Government's Exhibits 1 and 1-A respectively.)

Mr. Crawford: Your Honor, I understood the Government, in offering this exhibit, was offering it for a specific purpose, to wit the corpus delicti.

Mr. Luckey; At this stage, Your Honor, and further purposes we can connect it up.

The Court: Yes.

Mr. Crawford: Defendant Clark will save an exception to the Court's ruling.

Mr. Evans: Both defendants.

Mr. Luckey: I assume that 1-B is also admitted, Your Honor?

The Court: That's the box and the reel?

Mr. Luckey: And the slip of paper.

The Court: Of course, I have knowledge of 1-B.

Mr. Luckey: 1-B.

[fol. 195] The Court: It would not be in any sense a corpus delicti and the ruling on that is reserved.

* * * * * * *

[fol. 197] (At this point the Clerk hands Exhibit 1 to the witness.)

Mr. Evans: While he is spreading that, again, I don't think it's necessary, but in order that there be no question, we object to its being played at this time.

The Court: Your objection will be overruled.

* * * * * * *

[fol. 204] (At this point the jury left the courtroom and the following proceedings were had out of the presence of the jury.)

The Court: I would like the record to show that last evening shortly after 7:00, I believe, o'clock I received a telephone call from Mr. Walter Evans, counsel for one of the defendants, advising me, which I appreciated, that he was, on behalf of the clients, defendants, making applications to the United States Court of Appeals for the Ninth Circuit for an order staying these proceedings for a period of three judicial days allowing him opportunity to make a formal application, I believe, for a writ of prohibition against this Court in some particulars, which I won't go into detail on. He very kindly left a copy of that motion and the supporting data of that motion at my chambers door so that I received the same when I came in a little after [fol. 205] 8:00 o'clock this morning.

I would like to say for the sake of the record that I have received no information from any Circuit Judge of the Court of Appeals for the Ninth Circuit nor have I heard any communication from Mr. O'Brien, the Clerk of the Court, in connection with this matter. I do understand that Mr. Evans has received some information—I will be obliged

if he feels that he can—by way of a memo to him, I believe. Would you care to read that in the record?

Mr. Evans: Yes. That's what I was up for, Your Honor. I was handed as the Court knows, a few moments ago while that tape was playing, a note from my office. The initials are I.M.P. which are the initials of Irene M. Prahl, one of our secretaries, and the note is as follows: "Mr. Evans. Mr. Paul O'Brien, Clerk of Ninth Circuit Court of Appeals, called this A.M. shortly after 11:30 and said that the motion for stay in the Elkins case will be on the calendar Monday morning April 22nd for submission to the Court at 9:30 A.M. He told me to tell you to get in touch with all interested parties and notify them today that the matter will be on the calendar Monday morning. I.M.P."

The Court: Thank you very kindly, Mr. Evans. Now, I have Mr. Evans' copy of the motion to stay. Now, I am certainly advised more than I was advised last evening and more than I was advised by reading the newspaper this [fol. 206] morning. I think there is somewhat of official notice that there is pending in the Court of Appeals this application that's been referred to, referring to the copy of the motion to stay which Mr. Evans supplied to me, it appears that the petitioners being both the defendants herein have moved an order of the Court or of the Chief Judge thereof for a stay of the proceedings by the Honorable—mentioning the individual of this Court for the District of Oregon—in the trial of a certain indictment number C-18321 against these petitioners in the following respects, to wit: 1. Requiring the Honorable William G. East, Judge of the said court, to refrain from compelling, as Judge of said court, in the trial of this cause C-18321 the giving of testimony or producing of evidence or both by those officials of the County of Multnomah and of State of Oregon who are presently subject to the injunction of the Circuit Court of the State of Oregon for the County of Multnomah in any manner in violation of said injunction pending the further order of this court.

2. For a further order of this court permitting petitioners herein a period of three judicial days within which to prepare and file in conformity with the rules of

this court the papers, motions, and pleadings, necessary for the proper presentation to this court of a petition for a writ of prohibition directed to said Honorable William G. East, the Judge of said court.

[fol. 207] 3. Petitioners move for an immediate consideration of this motion for a stay and for the telegraphic notification to the attorneys of petitioners herein and, similarly, telegraphic notification to the Honorable William G. East, Judge of said District Court, of the decision of said court by the Chief Judge thereof on this motion. Apparently duly signed with the supporting affidavits attached.

Now, so far as I am officially advised at the moment the only injunction or restraining order that has been issued by the Circuit Court of the State of Oregon for Multnomah County is the one that was presented to the Court some several days ago.

Mr. Evans: That is correct, Your Honor. I have not had an opportunity to prepare a form of order. Judge Redding continued that until the form of order. And, I should say that he indicated in his remarks that he thought in the temporary injunction he would delete number 2. There were two particular categories. He said he felt that he wanted to think about number 2. But, he felt it was not necessary to have it.

The Court: In any event, what we have to deal with is the order that was issued that we have in mind. I have read that and it has been read into the record.

Now, analyzing this, I think as long as this matter is pending in the Court of Appeals I want to respect it. I [fol. 208] take it the matter that is pending in the Court of Appeals seeks to prohibit this Court from compelling under pains of perjury—or, contempt the giving of testimony or producing of evidence, or both, of those officials of the County of Multnomah and the State of Oregon who are named in the temporary restraining order. So, I conclude that so far what this Court has been engaged upon is in no wise an infringement of that temporary restraining order. So, I want further the record to show that Mr. Evans, on behalf of counsel for the defendant has stated that they

wanted to appear in the court in San Francisco Monday. So, with that in mind do I understand—

Mr. Evans: Yes, that is correct. We will have to see about getting reservations, of course.

The Court: What is the Government's position about it? Do you wish to be—

Mr. Luckey: Well, I assume, Your Honor, if the other side is to be represented the Government would be ill-advised to remain away.

The Court: I wonder if I can get a lawyer to represent me?

Mr. Evans: I am sure the Court would have no trouble.

Mr. Luckey: I hope that our position, Your Honor, could sustain the continuing of the proceedings.

The Court: So I will respect those proceedings and not [fol. 209] recognize any one of those witnesses in the course of this proceeding. But, now, to conserve my time, I think we will work most of the day on this.

Mr. Evans: We certainly appreciate that, Your Honor.

Mr. Crawford: I am a little confused. It will be—so that we may know, it was the intention of Mr. Evans and myself to be personally present in San Francisco at 9:30 o'clock next Monday morning to argue on behalf of this motion for stay. And, I presume that Your Honor's ruling at this time is that we may be allowed to do so?

The Court: That's what I contemplated, yes.

Mr. Crawford: Thank you, Your Honor.

Mr. Evans: I think, perhaps, it should be in the record that I am sure that counsel under it and the Court under it—although, the language of this writ of prohibition, that being the ancient common law writ—this, as we understand it, is simply a matter of testing this apparent conflict between the two jurisdictions.

Mr. Luckey: We will reserve any judgment as to whether or not in our view it is a proper method.

Mr. Evans: No. I understand that. I felt because of these proceedings reported it might be appropriate to say that because of peculiar language of the writ—

The Court: I see the picture of Judge Bean.

Mr. Foxley (Assistant Attorney General): I am repre- [fol. 210] senting the State officers that are involved. Do I

understand it correctly that they will not be called until this matter has been disposed of by the Circuit Court of Appeals?

The Court: No. I don't want to go that far. I will not in any event—I will recognize their request in any event to attend the court in San Francisco Monday. I will not recognize the calling of any of these witnesses until that time till after that hearing.

* * * * * * * *

[fol. 211] RONALD E. SHERK, previously produced as a witness in behalf of the Government, having been previously sworn, was examined and testified as follows:

Direct examination.

* * * * * * *

By Mr. Luckey:

Q. Mr. Sherk, you have previously testified today about Government's Exhibits Number 1 and 1-A. At the time that you received that tape did you also receive a tape that has been heretofore in the proceedings during the week of which this is the last day marked Exhibit 2 and 2-A?

[fol. 212] A. Yes, sir.

Q. Do you have that with you?

A. I do.

Q. When did you receive that exhibit?

A. On September 5, 1956.

Q. Did you receive it under the same circumstances that you have heretofore described with reference to receiving Exhibits 1 and 1-A?

A. Yes, sir.

Q. Is there also in the box a slip of paper or slips of paper?

A. Yes, sir.

Q. Would you tell us how they have been previously marked, Mr. Sherk? Would you examine them and tell us how they have been previously marked?

A. 2-B, 2-C, 2-D, 2-E, 2-F, 2-G.

Q. Now, you have had these exhibits continuously in your possession since September 5th, have you?

A. I have.

Q. Now, have you heard Exhibit 2, the reel and the tape that is on the Exhibit 2?

A. I have.

Q. Would you tell us what you have observed with reference to what you heard on a playing of Exhibit 2?

A. It contains the voices of men and, possibly, one woman [fol. 213] in conversation. It contains operators—what sounds to be operators working a long-distance call; contains the sounds of telephone bells ringing and buzzing sounds such as made by a telephone bell heard through a telephone line.

Q. Are all the conversations that are on the tape of equal clarity?

A. They are not.

Mr. Luckey: You may inquire.

Mr. Evans: Well, excuse me. You haven't offered anything yet, Mr. Luckey.

Mr. Luckey: I will offer Exhibit 2 and 2-A at this phase of the proceedings.

Cross examination.

By Mr. Evans:

* * * * * * * *

[fol. 220] May it please the Court, I think there is probably enough in the record at this time to renew the same objections I had to tape 1.

I believe I made all of them. During the noon hour I had time only to check on a very few cases, but I have a little authority. We object to the introduction or receipt in evidence of Government's Exhibit 2 because, again, it is my recollection at the time of the offering—the offer—at least, when it was identified, only related to the reel and nothing was said about the tape. And, it appears, I think, on this reel—I know, on the first—if not I would ask Mr. Sherk on this one—there is no actual marking on the tape

[fol. 221] to show the identity of the tape which contains the sound is the same.

Secondly, there is no evidence here that it was in the same condition or that there have been no alterations made.

Third, there is no foundation to tie it up in any way to these defendants.

Fourth, there has not been proper foundation laid to even establish what I would call a presumptive corpus delicti, if that is the theory under which they are offering it, since they would have to have something that in and of itself, unless otherwise explained, would indicate the commission of an offense. And, I don't understand it.

. . . . . .

[fol. 224] The Court: I am satisfied to live with my ruling. Your objection will be overruled as to both defendants as to Exhibit 1 and Exhibit 1-A.

Mr. Luckey: Now, I have one further question.

The Court: I beg your pardon. Correction. 2 and 2-A.

. . . . . .

[fol. 226] Mr. Crawford: Has Your Honor overruled our objection?

Mr. Evans: Did you mean to receive it in evidence? I don't know that the record shows it.

The Court: It certainly does, sir.

Mr. Evans: Very well.

[fol. 227] (At this point a roll of recording tape wound about a plastic reel and its cardboard container were received in evidence as Government's Exhibits 2 and 2-A respectively.)

. . . . . .

[fol. 230] The Court: Member of the jury, I think you are entitled to be advised that the United States Court of Appeals for the Ninth Circuit sitting in San Francisco has taken jurisdiction of a phase of this matter—purely legal phase. By reason of that there is a hearing at 9:30 on Monday morning and counsel have requested that they desire to be present to be heard by that court at that time. Inasmuch as the Court has recognized that and it will hear this phase on the legal matter, this Court is naturally bound

to desist in any further proceedings so long as it is pending in that court. So, with that view it will be necessary for us to recess this matter through Monday.

* * * * * * *

[fol. 233]

Transcript of Proceedings

MORNING SESSION

(Court reconvened proceedings herein at 9:30 o'clock A. M., April 23, 1957, pursuant to adjournment, and the following proceedings occurred herein.)

* * * * * * *

[fol. 237] RONALD E. SHERK, previously produced as a witness in behalf of the Government, having been previously sworn by the Clerk, was examined, and testified as follows:

Direct examination.

* * * * * * *

By Mr. Luckey:

Q. Now, two of those tapes have been heretofore offered and have been played for the records of the Court. Mr. Sherk, do you have a third tape with you?

A. Yes, sir.

Q. Would you produce it, please?

[fol. 238] (Whereupon the witness does as requested.)

By Mr. Luckey:

Q. Did you obtain the articles that you have there at the same time and under the same circumstances that you have obtained the Exhibits 1 and 2 with their alphabetic subdivisions heretofore offered?

A. Yes, sir.

Q. Now, as I recall, during the preliminary proceedings in connection with the playing of these tapes there were some reels that were defective and some substituted. Is this one of those reels?

A. No, sir.

Q. It is not. Then, the reel that you have there is the reel that was in the box when you obtained it from the bank?

A. Yes, sir.

Q. Is the tape the same tape that you received from the bank?

A. It is.

Q. And are there slips of paper in the box?

A. There is one slip of paper, Mr. Luckey.

Q. How is it marked?

A. It was marked "Pretrial Exhibit 3-B."

Q. What is the box marked?

A. Government's 3-A.

Q. Is the reel marked with the tape on it—the reel with [fol. 239] the tape on it marked?

A. 3 Government's.

Q. You had these articles continuously in your possession, have you, since September 5, 1956?

A. I have.

Mr. Luckey: I would offer Exhibits 3 and 3-A, Your Honor, the box and the reel of tape.

* * * * * * *

[fol. 245] Mr. Evans: If Your Honor please, I understand this is being offered under the same theory as part of proof of corpus delicti. We object, Your Honor, on the grounds there has been no proper foundation, insufficient identification, since what has been identified is the reel and container and no mark on the tape itself.

I am a little puzzled both as to this and the first two exhibits whether we should renew the objections we interposed on the motion to suppress. I assume that having heard Your Honor—Your Honor having heard that and ruling on it that it was not necessary to make them again. If the Court is in any doubt about it we would also object—

The Court: I have no doubt. But, I want you to protect [fol. 246] your record.

Mr. Evans: Just so the record shows we have not waived anything in that respect. We think they are also

inadmissible because of the manner in which they were ultimately obtained by the State officers.

Mr. Crawford: I would add to Mr.—I adopt Mr. Evans' objections and what he has said in that regard for the defendant Clark and also add that we renew our objections to the admissibility of Government's Exhibits 3, 3-A, and 3-B on the grounds and for the reasons that there is no proper foundation laid in that there has been no evidence received by this Court in any manner, shape, or form tending to connect the defendant Clark with these tapes. And, it is not shown as to this particular tape anything at all since it came—before it came into the possession of Mr. Sherk and before he played it on September 6, 1956—there is no chain of custody placing it or tending to place it in possession of the defendant Clark.

* * * * * * *

[fol. 247] Cross examination (cont'd).

By Mr. Evans:

Q. Mr. Sherk, as I understand it you came into possession of this particular exhibit—or, all of these exhibits, is it, in the Pioneer Bank—or First State Bank of Milwaukie? I am not sure which bank it was.

A. I think it was the First State Bank.

Q. And, actually, where were you in the bank?

A. At the time that I took the tapes physically into my possession?

Q. Yes.

A. I was in the area at the rear of the bank where the safety deposit boxes are located.

Q. Where were the tapes when you first saw them—or, [fol. 248] the exhibits—the whole works?

A. On September 5th?

Q. On September 5th. Thank you, Mr. Sherk.

A. They were in a safety deposit box in the First State Bank of Milwaukie.

Q. Do you know whose safety deposit box that was?

A. It is my understanding that it was the safety deposit box—

Q. Wait a minute before you answer that. Maybe I had better ask you if you have any understanding so we will know how you got it. And then, I will ask you the other. How did you find out whose box it was? Did you make any investigation? Well, let me ask this: There had to be two keys to open it, didn't there?

A. Yes. Well, now—

Q. The bank had one key?

A. You will recall we went through that testimony before this same jury on Saturday with respect to the other tape.

Q. I didn't recall that, Mr. Sherk. Sorry. My mind's probably been occupied with a good many things.

Do you know whose name the box was listed in?

A. It's my understanding it was in the name of the Oregon State Police.

* * * * * * *

[fol. 249] The Court: Objection will be overruled and Exhibit 3 will be received under the State's theory as part of the res gestae. And, Exhibit 3-A will be received as being a box containing 3—

* * * * * * *

(At this point a roll of electronic tape on a plastic reel and its cardboard container were received in evidence as [fol. 250] Government's Exhibits 3 and 3-A.)

* * * * * * *

[fol. 255] Direct examination.

By Mr. Luckey:

Q. Now, Mr. Sherk, you have with you one of the additional reels that you have heretofore described as having been obtained by you on September 5, 1956?

A. Yes, sir.

Q. Did you listen to this additional reel heretofore?

[fol. 256] A. Yes.

Q. Would you tell what you observed in the way of sounds on the reel?

A. It contains conversations and sounds similar to those

contained on reel number 2 which has already been played for the jury.

Q. Now, would you identify for us the document or article that you are referring to now by number?

A. Yes. They have been marked as Government's Exhibits 4, 4-A, and the documents with it, I believe, are 4-B, -C, -D, -E, -F. That's not correct.

Q. Do you have the article with you? Would you examine it?

A. 4—no. 4, 4-A, and 4-B.

Q. Is there more than one reel in your possession now?

A. Yes. I have Government's 4 and Government's sub-4.

Q. Were you present when there was any basis for an explanation of why you have a 4 and a sub-4 reel?

A. Yes, sir.

Mr. Evans: We will be glad to stipulate as to that, Your Honor, to save time. That is the reel that appeared cracked or defective when we were playing them during discovery and to avoid damage to the tapes it was agreed that reel sub-4 could be substituted for reel 4.

The Court: Is it agreeable to defendant Clark?

Mr. Fallgren: Yes, Your Honor.

[fol. 257] The Court: Let the record so show.

Mr. Luckey: All right. Thank you.

Q. Now, is the tape that's on 4-sub the same as was on reel 4?

A. Yes, sir. The same tape.

Q. Has reel 4 and the tape that was on it that is now on reel 4-sub been in your possession since the time of your obtaining it on September 5th?

A. It has.

Q. What is the mark on the box which the article was contained in?

A. 4-A.

Mr. Luckey: The Government will offer Exhibits 4 and 4-sub with the tape and the box 4-A.

* * * * * * *

[fol. 268] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Evans: At this time, Your Honor, we have the same objection as to the previous exhibits, no proper foundation and insufficient identification and the grounds urged on our motion to suppress.

The Court: I understand your grounds.

Mr. Crawford: We also join in that motion, Your Honor, and for the further reason that there is no showing on the part of the Government that the defendant Clark is in any way connected with the so-called tape, Exhibit 4.

Now, Your Honor, in consulting our notes during the noon hour it was my understanding that Exhibit 3 was offered for the limited purpose of tending to prove the corpus delicti.

The Court: Right.

Mr. Crawford: Now, our notes show and we would like to be clear on this that perhaps we misunderstood Mr. [fol. 269] Luckey when he made his offer and that he offered them as part of the res gestae.

Now, could you clear that up for us, Mr. Luckey?

Mr. Luckey: I don't recall having mentioned res gestae during the course of this trial, Your Honor.

The Court: Maybe we got our Latin mixed up. Could be.

Mr. Crawford: But, if it is it is de minimus non curat lex, Your Honor.

The Court: I agree with you. Well, in case there is any doubt about it the Court intends to have admitted them at this stage of the trial in connection with the Government's contention that they tend to establish the res gestae of the alleged crime.

Mr. Crawford: The res gestae?

The Court: Corpus delicti.

* * * * * * *

[fol. 270] The Court: Objection is overruled and Exhibit 4 with the tape wound about it will be received in evidence for the limited purpose of the Government's contention that it tends to establish the corpus delicti.

Mr. Morrell: If the Court please—

The Court: 4-B, the box, will be received also.

Mr. Luckey: We are offering only 4, 4-sub, and 4-A, Your Honor.

The Court: Right.

(At this point a roll of electronic recording tape, two plastic reels therefor, and the cardboard container for one of the plastic reels were received in evidence as Government's Exhibits 4, 4-sub, and 4-A.)

[fol. 274] By Mr. Luckey:

Q. Mr. Sherk, you have previously mentioned five tapes of which four, I believe, have been heretofore introduced. Did you have the fifth one in your possession at all times since September 5th?

A. Yes, sir.

Q. Do you have the fifth roll with you?

A. Yes, I do.

Q. Did you get this at the same time and place and under the same circumstances as you obtained the other four?

A. Yes, sir.

Q. Now, you have what appears to be an additional reel on top of the box on Exhibit—is that 5?

A. Yes.

Q. What is the explanation for that reel in addition there?

A. At the time that the tapes were run for the Court [fol. 275] last week one of the reels became defective and was replaced with another reel so that the tape is the same but it's wound onto a substitute reel which is labeled Government's sub-5.

Q. Same situation as with the previous reel as you testified to?

A. Yes, sir.

Q. What is the box marked?

A. 5-A.

Q. Is there a piece of paper in it?

A. Yes.

Q. What is it marked?

A. 5-B.

Q. Now, what is the reel that has the tape on it now marked?

A. Sub-5. Government's sub-5.

Q. Have you heard the tape that is on Government's sub-5?

A. Yes, sir.

Q. Could you tell us what your observations were as to its contents?

A. It contains conversations similar to those contained on Number 4 which was just played.

Mr. Luckey: I would offer Government's Exhibits 5 and sub-5, the reel with the tape on it, and the box, Exhibit 5-A.

[fol. 276] Mr. Evans: Same stipulation, Your Honor, as far as 5-sub is concerned. We were present and are familiar with the substitution of the reel and raise no question on it.

The Court: Thank you.

Mr. Evans: Same objection as to the others.

• • • • • • • •

[fol. 279] Mr. Evans: Could we have the same objections, Your Honor, as to the previous ones: no proper foundation, no identification with matters raised on the motion to suppress? And, we claim that they do not tend to establish a corpus delicti.

Mr. Crawford: And, the same objections on behalf of the defendant Clark.

The Court: Your objections are overruled and they are admitted for the same purposes as the other tapes.

[fol. 280] (At this point Government's Exhibits 5, being a roll of electronic recording tape, sub-5, being the reel substituted for reel 5, and the container therefor, 5-A, were received in evidence.)

• • • • • • •

[fol. 569] GEORGE MINIELLY, produced as a witness in behalf of the Government, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Luckey:

Q. Mr. Minielly, would you tell the Court and jury your name again, please?

A. George Minielly.

Q. What is your occupation, Mr. Minielly?

A. I am a deputy sheriff, Multnomah County, State of Oregon.

Q. How long were you so employed?

A. Twenty-seven years.

Q. And, you live in Portland, do you?

A. Yes, sir.

Q. Now, Mr. Minielly, in connection with your duties as a deputy sheriff did you have occasion on or about May 17, 1956, to visit the home of Raymond F. Clark?

Mr. Evans: Objection, Your Honor. That is one of the matters that is covered in the State court restraining order.

The Court: It will be overruled.

Mr. Evans: I would like to be heard on that, Your Honor.

The Court: Do you have any new grounds other than what has been discussed?

Mr. Evans: Your Honor is familiar with 28 U.S.C.A. 1738. That's the full faith and credit.

[fol. 570] The Court: Yes.

Mr. Evans: There are two cases discussing that. One of them is 173 U.S. 555, in which the statement is dicta, but the principle is recognized and was followed in 312 U.S. 183, requiring the courts of the United States to give full faith and credit to judgments of state courts where the state court had jurisdiction of the parties and subject matter.

The Court: Yes, I am acquainted with that.

Mr. Evans: Then, all the other grounds we have urged.

The Court: Very well. The motion is overruled.

Mr. Evans: Now, in order to save popping up and down, may it be understood that our objection would run to any and all questions relating to the activities of Mr. Miniellly as deputy sheriff in connection with the occurrences or so-called search of May 17, 1956, and any information contained therein and as a result thereof. I don't want to keep popping up and down. I imagine Mr. Crawford joins with me in that objection.

Mr. Crawford: I wish to also join in behalf of defendant Clark and object to this witness giving any testimony of any kind or nature arising out of an occurrence which took place at the home of the defendant Clark at 2409 Main Street, Portland, Oregon, on or about May 17, 1956.

Also, I want to object to the giving of any evidence on the part of this witness of any evidence that he secured [fol. 571] as a result of being present at the home of Raymond Clark at the said time and place.

The Court: I am sure I understand the defendants' respective motions. If they are satisfied with the record to be that way, I am.

But, I do think that when the occasion comes that you feel that your objection is not being met with you indicate that that is the end of what you are objecting to.

Mr. Crawford: Oh, no. We just didn't want to be continually—we will assert the objection and then make it to each and every question as it goes, if that is the way the Court would want it. But, we would like to state our position in the matter now so there can be no doubt as to what we are objecting it.

The Court: Well, until you indicate to the Court that you are no longer objecting to it, why, then, I assume you're objecting to everything the Court does. All I am asking you to do is indicate.

Mr. Evans: We will be very happy to, Your Honor.

Frankly, it's hard for me to see what this witness would know about that would not be within it. But, until we come to that point—

The Court: I certainly did not—in any question he has been asked, it certainly doesn't have reference necessarily—

Mr. Evans: May I have the question read again?

[fol. 572] (At this point Mr. Luckey's last question to the witness was read by the Court Reporter.)

The Court: Now, it may, I don't know; may not.

Mr. Crawford: Well, we feel if we don't object at this point—

The Court: I am not crossing the bridge yet.

Mr. Evans: I understand, Your Honor.

Mr. Luckey: May the witness answer the question?

The Court: Yes, he may.

By Mr. Luckey:

Q. Do you remember the question, Mr. Minielly?

A. Yes, sir. I was at the home of Raymond Clark, May 17, 1956.

Mr. Luckey: May the witness be shown Exhibit, 1, 1-A and the one marked for identification purposes 1-B and, also, 2 and the related—2, 3, 5—2, 3, 4, and 5?

The Clerk: Mr. Luckey, did you include the boxes?

The Court: Yes.

Mr. Luckey: That's right.

The Court: All three.

(At this point the Clerk hands the exhibits requested by Mr. Luckey to the witness.)

By Mr. Luckey:

Q. Now, Mr. Minielly, you have before you now Govern-[fol. 573] ment's Exhibits 1-A, 1, 2-A, 2, 3-A, 3, 4-A, 4, 5-A, 5, and some reels marked substitute, whatever the appropriate number is there, as well.

Now, with the exception of those that are marked substitute can you tell this Court whether or not you have seen any of those objects before?

Mr. Evans: Excuse me, Mr. Minielly. Now, Your Honor, it appears to me that there is no doubt that this is the appropriate time to interpose the objection. I don't know whether I am under the duty to advise the witness of the contents of the restraining order or not. It appears to me there might be a conflict.

The Court: You may inquire in cross-examination if he has any knowledge of it to show whatever—

Mr. Evans: No, I don't. As an obligation of the Court, is all. I will leave that to the hands of the Court.

The Court: I don't know which court you're an officer of.

Mr. Evans: Well, both, Your Honor.

The Witness: Your Honor, may I ask a question?

The Court: Yes, indeed you may.

The Witness: I believe that I am under a restraining order from the Circuit Court; namely, Judge Redding, to not—not to testify before this Court. Now, I have received a subpoena—a Federal subpoena from this Court to testify and that's why I am here.

[fol. 574] Now, I don't know too much about the law, but I am of the opinion that I am subpoenaed here by the Federal court and if you so order me to testify it's my duty to testify.

The Court: Well, Mr. Minielly, to advise you, you are aware of the order that's been entered by the Circuit Court of the State of Oregon for Multnomah County with reference to this matter of the search directed to you?

The Witness: Merely reading about it. I haven't received any order.

The Court: You haven't? All right.

The Witness: I received a summons regarding the situation from these gentlemen here, these attorneys representing the defendants, but I have—I haven't received any restraining order signed by Judge Redding.

The Court: Or any copy thereof?

The Witness: No.

The Court: But, you have read about it in the newspapers?

The Witness: I have read about it in the papers.

The Court: And, you have reason to believe that applies to you?

The Witness: Yes, sir.

Mr. Evans: May it please the Court—

The Court: Yes.

Mr. Evans: —I think that is correct. However, Mr.

[fol. 575] Minielly was represented at that hearing by

counsel, as I recall, and I believe—and I can get the transcript—all counsel stipulated that the parties would be bound by whatever the—whatever order the Court would enter.

The Court: Let the record so show. I just raised the query. I don't know. It isn't the attorney who would be held in contempt.

Mr. Evans: Well, may I have—

The Court: I am not going to determine whether or not this witness has received the statutory personal knowledge of the existence of the order. He has indicated that he knows about, he believes he would be bound by it.

Mr. Evans: May I have the copy certified to the Court as correct by me that I handed the Court? Does the Court still have it in its possession? If not I believe I have another one here. I was looking for it.

The Court: Yes, I do have it, Mr. Evans.

Mr. Evans: I wonder if that may be handed to the witness.

The Court: Have it marked as an exhibit.

The Clerk: Defendants' 14, Mr. Evans.

(At this point a three-page typewritten document entitled Temporary Restraining Order was marked for identification as Defendants' Exhibit 14.)

[fol. 576] (At this point the Clerk handed the document just marked for identification to the witness.)

Mr. Evans: The record can show the witness is now reading it, Your Honor.

The Court: Yes.

Mr. Morrell: Did I understand Mr. Evans correctly that is a copy that he has certified?

Mr. Evans: That I have certified myself and filed. If I had gotten quicker service this noon I'd have a clerk-certified copy.

The Court: Have you had a chance to go over it?

The Witness: Yes. I was given a copy of this.

The Court: Very well. You now admit—or, know that you were given a copy?

The Witness: Yes. I still have it in my desk.

The Court: And, I understood you to say that you acknowledge that you have been served with a subpoena from this Court to give testimony?

The Witness: Yes. I have it on my person.

The Court: Are you advised either directly by counsel of your—by a legal counsel of your rights in this matter and your duties?

The Witness: Well, I have been advised that I must appear on a Federal subpoena.

[fol. 577] The Court: You have sought some advice about it?

The Witness: Yes.

The Court: Have you been advised by any person or read through the newspapers or have any knowledge that this Court has reached the conclusion so far as this Court is concerned that the order referred to by the Circuit Court is null and void so far as this Court is concerned?

The Witness: I read that article.

The Court: Good. Very well. Then, this Court will order you to hold yourself amenable to the subpoena and answer such questions as shall be directed to you by counsel unless the Court instructs you not to.

The Witness: Yes, sir.

Mr. Evans: Can we have an exception, Your Honor?

The Court: Yes.

By Mr. Luckey:

Q. Now, Mr. Minielly, I believe my question to you was: Do you recognize those articles labeled 1, 1-A, 2, 2-A, 3, 3-A, and 4, 4-A, and 5, 5-A?

A. I find my initials on these five boxes containing electronic tapes 1, 2, 3, 4, 5. I believe these boxes to be the one and the same boxes containing electronic tapes that I seized on the night of May the 17th, 1956.

Mr. Crawford: Now, our objection, Your Honor, goes to all this line of questioning for the reasons previously stated so that the record will be perfectly clear, that we are ob-

[fol. 578] jecting to this testimony giving—this witness giv-

ing testimony on the subjects mentioned in our objection.

The Court: Your objection will be overruled.

* * * * * * *

[fol. 799] TERRY D. SCHRUNK, produced as a witness in behalf of the Government, being first duly sworn by the Clerk, was examined, and testified as follows:

* * * * * * *

Direct examination.

By Mr. Luckey:

Q. Would you please tell the Court and jury your name, sir?

A. Terry D. Schrunk.

Q. Where do you live, Mr. Schrunk?

A. 5407 North Houghton; Portland, Oregon.

Q. What is your present occupation?

A. Mayor of the City of Portland.

Q. What was your occupation before you became mayor?

A. I was the duly elected Sheriff of Multnomah County.

Q. How long did you serve as Sheriff of Multnomah County?

A. From 1949 to 19—to the last day of 1956. It was October of 1949.

Q. During the time that you were Sheriff were you asked to, in the course of your duties, conduct or have conducted a search and seizure of the premises later identified as the premises of Raymond F. Clark?

[fol. 800] A. Well, Your Honor—

The Court: Yes.

The Witness: —I think the Court is aware that I am in a very peculiar position in this matter. My desire to cooperate with law enforcement—I understand that I am under restraining order from the Circuit Court of Multnomah County which has said that I cannot testify. I am under subpoena for this court.

The Court: Very well.

The Witness: That places me in an impossible position.

The Court: Very well. I hand you what has been designated as the Court's Exhibit 14 and ask you if that appears to be a copy of the order of the State court that you just referred to. I might say to you that it's been stipulated by counsel that it is a copy of the court order issued by Judge Redding.

The Witness: It is my impression this is—

The Court: And, you acknowledge that you are under subpoena in this court?

The Witness: Yes, sir.

The Court: I believe that this witness is also designated in a subpoena which has been marked Court's Exhibit 19. Have you been advised of your rights in connection with these two conflicting orders?

The Witness: No, sir; not fully. It seems that I—

[fol. 801] The Court: Do you wish an opportunity to seek legal counsel?

The Witness: Well, may I inquire of the Court—

The Court: Yes.

The Witness: —certainly I realize that this Court should be—the State court should protect a citizen's position so he doesn't get in this impossible position of being in contempt. I don't want to be in contempt of either court.

The Court: I understand your position, Mr. Schrunk.

The Witness: If I comply with the Circuit Court restraining order what is my position in this court, sir?

The Court: I can advise you of what this Court's position is and after the Court has done so then if you wish to seek independent advice, why, you will be given the opportunity to do so.

The Witness: Thank you, sir.

The Court: The situation, so far as this Court is advised, is as follows: that the Circuit Court of the State of Oregon for Multnomah County under an order dated April 15, 1957, in a cause then pending in that court where the defendants in this cause are plaintiffs and yourself as one of some several defendants and that that order purports to enjoin and restrain you from giving any testimony or evidence in the trial of this cause now pending in this [fol. 802] court of any information that you may have of and concerning articles taken at the search and seizure

conducted by the Multnomah County Sheriff's office at the residence of the defendant, Raymond Frederick Clark, on May 17, 1956. This Court has been advised of the issuance of that order and has determined its own conclusion and has announced heretofore in open court that it is the position of this Court that so far as this proceeding in this United States District Court for the District of Oregon is concerned that that order purports to interfere and restrain the process and the exercise of the jurisdiction of this Court under Federal law and that therefore so far as these proceedings are concerned is a nullity and of no force and effect; and that that order is subject to appropriate action by this Court upon appropriate application thereto. Therefore, this Court further being advised that the matter was presented to the Court of Appeals for this district being the immediate appellate court of this trial court seeking a stay for a period of three days within which these defendants might make formal application for an order of that appellate court preventing this Court to going forward and enforcing this order as it had indicated that it would do and that that appellate court after hearing counsel entered an order to the effect that the application was denied, and further contains the statement that so far as that appellate court was concerned they knew [fol. 803] of no rule of comity requiring this Court to recognize that court's order—whether or not that is decisive of the question that you asked me, I am in no position to advise you. But, it is the intention of this Court that under its obligation that it is obliged under the laws of the United States to order you to appear and give testimony in this matter on such questions as the Court shall order are properly made to you.

Now, in view of that if you fail to acknowledge that order it would be necessary for this Court to deal with the matter and make such determination as it deems appropriate in a contempt proceedings.

With that in mind, sir, if you wish to seek legal advice you may do so.

The Witness: May I be excused to talk to my counsel, sir?

Mr. Crawford: Before the witness leaves the stand—

The Court: Yes.

Mr. Crawford: —only on this particular subject—

Q. Mr. Schrunk, may I ask these questions? Of course, we appreciate the position that you're in. I wonder if when you seek counsel would you ask your counsel whether or not you intend to do anything in the nature of appealing from the State order or attempting to stay the execution of the injunction or legal proceedings of a like nature? [fol. 804] Would you please do that when you consult with your attorney?

The Court: You may ask your attorney any advice you desire to ask.

The Witness: Thank you.

Mr. Evans: Advise either him or—I see his counsel present—about the Schendel case. That's—I don't know whether you wanted to go into any discussion about the case, Your Honor—appropriate remedy.

The Court: No. I will have to ask counsel to advise themselves. Those are matters of public record.

Mr. Kell: May we have just two minutes?

The Court: Yes, indeed you may.

Mr. Evans: Does the Court plan on recessing about 1:00 o'clock?

The Court: Just as soon as we get over this decision.

(At this point Mr. Schrunk left the courtroom with his counsel and returned to resume the witness stand again.)

Mr. Kell: May it please the Court—

The Court: Yes.

Mr. Kell: —before the witness answers or gives his decision I would like to make certain that the record in this proceeding shows these three things:—

The Court: Yes.

Mr. Kell: —first, that he has previously been sub-[fol. 805] poenaed by the defendants and has testified concerning the matters that are now prohibited without objection; secondly, that there is an outstanding and valid subpoena by the Government compelling him to testify at this time; and, last, the Court in its advice has advised him that failure will result in—failure to testify will re-

sult in appropriate action by the Court to preserve its prerogatives and compel that testimony. If that is the basis of the record—and, fourthly, that his answer is given after advice and on advice of counsel.

The Court: Let the record so show.

Mr. Kell: So—

Mr. Evans: If it please the Court, I think there should be one amplification of that. As I understand it, at the time he was subpoenaed it was on the motion to suppress; in other words, to determine the very question; and that he had not previously been subpoenaed by these defendants in this court generally to testify.

Mr. Kell: It was in this proceeding.

Mr. Evans: Yes; on the motion to suppress.

The Court: I think counsel understands that. All right. You may place your question to this witness.

Mr. Evans: Excuse me. Before you do that, just for the sake of the record we enter the same objections that we did when this was raised on—the question raised by Mr. Minielly.

[fol. 806] The Court: I understand.

Mr. Crawford: And, also for the defendant Clark.

The Court: I understand the basis of your requests and each of them are denied.

Mr. Kell: I take it the witness is ready to advise the Court of his decision in the matter.

The Court: Thank you. You may proceed.

The Witness: In view of the advice of counsel I shall testify to the facts known to me.

The Court: Thank you. Let the record so show.

* * * * * * *

[fol. 808] Direct examination (con't).

By Mr. Luckey:

Q. Now, Mayor Schrunk, on last May 17th, in the course of your duties did you receive a search warrant delivered to you by the District Attorney?

Mr. Evans: May I assume our objection of Saturday is a continuing objection for the record?

The Court: You may on behalf of both defendants.

The Witness: Your Honor, may I inquire of the Court, am I correct in assuming I am under the same order as—and instructions—

The Court: Yes. The Court orders you to answer the question.

The Witness: I did.

* * * * * * *

[fol. 826] COLLOQUY

The Court: Well, with the understanding that the information on these slips so far as defendants are concerned or any information that is on the slips is hearsay so far as these defendants are concerned, therefore, they cannot at this stage at least be introduced in—as evidence tending to prove the truth of any statement that might appear thereon. But, the Court is of the opinion that they are now admissible as part of the contents of the boxes. And, subject to their being in some way tied in with the defendants they are still hearsay and they are accepted. They will be received on that restricted basis.

Mr. Crawford: I will save an exception to the Court's ruling.

The Court: You may.

(Whereupon the slips of note paper previously marked for identification as Government's Exhibits 1-B; 2-B, -C, -D, -E, -F, -G; 3-B; 4-B; and 5-B were thereupon received in evidence.)

* * * * * * *

[fol. 1089] OSCAR D. HOWLETT, produced as a witness in behalf of the Government, being first duly sworn by the Clerk, was examined, and testified as follows:

The Court: Mr. Howlett, in connection with your testimony I hand to you what has been received in the record and has been filed as Exhibit 14.

The Witness: Thank you, Your Honor. Yes, Your Honor.

The Court: Well, I just wanted you to have it in case any question came up about it. You may proceed, Mr. Luckey.

Direct examination.

By Mr. Luckey:

Q. Mr. Howlett, are you here under subpoena?

A. Yes, I am.

Q. What is your name, sir? Full name?

A. Oscar D. Howlett.

Q. Where do you live, Mr. Howlett?

A. 4710 Southeast Long Street; Portland, Oregon.

Q. What is your occupation, sir?

A. I am a lawyer, deputy district attorney for Multnomah County.

Q. How long have you been so employed?

A. Two—a little over two years.

Q. Now, during the course of your service as a deputy district attorney in May of 1956 did you participate in an investigation of a matter pertaining to some evidence [fol. 1090] obtained purportedly from the home of Raymond F. Clark?

Mr. Evans: Excuse me, Mr. Howlett. At this point, Your Honor, I wish to interpose an objection. Mr. Howlett is one of the witnesses who is a defendant in the State circuit court action and subject to the restraining order. And, we object to any testimony from him on that ground as being against the public policy of the State of Oregon.

The Court: I understand.

Mr. Fallgren: On behalf of defendant Clark we enter the same objection together with the other objection raised on our motion to suppress and our motion concerning this evidence.

The Court: Let the record show your objections.

Mr. Howlett, are you acquainted with the order of the Circuit Court of Multnomah County, a copy of which has been shown to you?

The Witness: Yes, I am, Your Honor.

The Court: And, I understand you're also under subpoena into this court; is that correct?

The Witness: That is correct.

The Court: Have you found the original?

The Clerk: No, I haven't.

Mr. Evans: We would be happy to stipulate, if Your Honor please, that whatever Mr.—

The Court: Do you recall what day you were served [fol. 1091] with a subpoena?

Mr. Evans: With reference to the restraining order.

The Witness: I was—well, I was served with a subpoena that called for me to report on the 29th day of April, 1957. I don't see the date of the service. I think it was the same date.

By Mr. Luckey:

Q. Mr. Howlett, have you before ever been served with a copy of the circuit court's restraining order?

A. No, I have never been served with a copy of the restraining order prior to this time.

Q. During previous proceedings in this same cause in this court have you been subpoenaed as a witness by the defendants?

A. Yes; that is correct.

Q. Did you give testimony—

A. Yes.

Q. —on that occasion for the defendants?

A. That is correct.

Q. Now, do you recall my previous question?

A. Oh, yes.

Mr. Evans: Excuse me.

The Witness: At this point I would ask the Court—

Mr. Evans: Before you do that there has been preliminary inquiry here and I wondered if we could ask a few questions in connection with that?

The Court: You may make some preliminary—

[fol. 1092] By Mr. Evans:

Q. Mr. Howlett, you were personally present and appearing for yourself and some other witnesses before Judge Redding?

A. That is correct.

Q. And you actually heard Judge Redding announce the restraining order from the bench?

A. That is correct. That was a 48-hour temporary restraining order.

Q. That's right. And then were you there when it was continued?

A. No. I didn't happen to be there, but I—

Q. You weren't there?

A. But, I have heard about it.

Q. And, you have seen the certified copy which the Judge has handed to you?

A. Yes.

Q. Now, one other thing: This previous testimony that was referred to, that was on the motion to suppress filed here in Federal court, was it not, when you were—

A. Where I appeared as a witness for you—for your client.

Q. That's right. I was not in the case at that time. But, the point I was making, that was testimony relating to the motion to dismiss filed in Federal court?

A. Yes.

Mr. Evans: That's all the preliminary questions I have, [fol. 1093] Your Honor.

The Court: Mr. Howlett, the Court understands that the restraining order of the circuit court mentioned has been issued and upon the occasion of the issuance of the order this Court stated during these proceedings that it was of the opinion that so far as these proceedings were concerned that that order would have no force and effect to these proceedings and any witness named therein and purported to be restrained from testifying as the Code provided if subpoenaed here would be ordered by this Court to answer such questions as would be propounded to him by counsel unless overruled or objections thereto sustained by the Court. In other words, such questions would be placed to you with the approval of the Court.

This Court has further considered the matter throughout these entire proceedings and is still of that opinion. If you want to take an opportunity to advise yourself about the matter and your respective rights or duties—

The Witness: The Court has ordered me to answer questions?

The Court: Well, I proposed to so order if the question comes and the Court is asked to order. But, I just wanted to know if you wish time to advise yourself.

The Witness: No, I don't.

The Court: Very well, then. The Court will order you so far as its process and subpoena powers are concerned to [fol. 1094] answer such questions as would be propounded to you by counsel with the approval of the Court.

The Witness: Thank you.

Mr. Evans: Could we have an exception to the Court's ruling?

The Court: Yes.

Mr. Evans: And to save our bobbing up and down I assume our objection is a continuing one and will run to all matters pertaining to the subject matter of the restraining order.

Mr. Crawford: May the defendant Clark's objection be entered also?

The Court: Yes, Mr. Crawford.

* * * * * * *

[fol. 1145] COLLOQUY

Evening Session

(Court reconvened proceedings herein at 7:10 o'clock P.M., April 30, 1957, and further proceedings occurred as follows:)

Mr. Luckey: Howard Lonergan.

Mr. Evans: If it please the Court, we have a little problem with respect to Mr. Lonergan. I saw him in the hall and I just asked Mr. Luckey before the Court came in whether or not he intends to call him. As the Court will recall from our exhibit, Mr. Lonergan was originally named as the defendant in the injunction suit, was served and appeared at the time of the initial hearing.

At that time—as the Court knows, of course, he is an attorney, left the District Attorney's office and is practicing privately. He advised the Court that he had not been subpoenaed in this case and knew nothing about it and didn't anticipate that he would be. On that represen-

tation he was—a dismissal was taken as to him on the specific understanding that he gave Judge Redding that if he was served he would notify Judge Redding and we would be given an opportunity to bring him back in.

Now, I spoke to him in the hall and I understand he has notified Judge Redding but, of course, we didn't know about it until we got back here about five minutes to seven [fol. 1146] and have not had an opportunity to join him in the injunction suit.

The Court: All right.

Mr. Evans: And I have—therefore, I would like leave to have that done. In fact, I feel it is imperative that we do so. I am sorry I didn't know this was coming up until just now. Does the Government have any other witness that they could call in his place without seriously discommoding them?

Mr. Luckey: Well, we have Mr. Lonergan here. The other witnesses we have have not yet arrived, Your Honor.

The Court: You may call the witness.

[fol. 1147] Howard R. Lonergan, produced as a witness on behalf of the plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Mr. Evans: In order that the record may be clear I make a specific request that this be reserved, that the examination of Mr. Lonergan be reserved until we have had an opportunity to again join him in the State Court injunction suit which is now pending to which he was a party. And I would be glad to have Mr. Lonergan verify my statement of the circumstances under which—

The Court: Let the record show your remarks. You will be given the opportunity to interrogate the witness on his voir dire if you want to call it that or his qualifications to testify.

Mr. Evans: Well, it is not a question of qualifications. it is a question of the effect of the restraining order, Your Honor.

Mr. Luckey: If the Court please, I understand the Court and this Court has ruled the restraining order of no force and effect, anyway. I see no point in disrupting the proceedings.

Mr. Evans: I think that is true. But I think the fact remains—

The Court: You may have your record, Mr. Evans.

Mr. Evans: Well, all right. I take it you are denying [fol. 1148] my request?

The Court: I have not ruled on it because there is nothing to rule on.

Mr. Evans: Very well.

Direct examination.

By Mr. Luckey:

Q. Please tell the Court and jury your name?

A. My name is Howard R. Lonergan.

Q. Where do you live, sir?

A. I live at 9645 Southwest Ardenwood Street in Beaverton.

Q. What is your present occupation, sir?

A. I am a lawyer.

Q. During May of 1956 what was your occupation?

A. I was a deputy district attorney of Multnomah County.

Q. When did you leave that employment?

A. The exact date I am not too sure of on account of financial reasons when they dropped me from the payroll. But it was about the end of April of this year. I beg your pardon, the end of March of this year.

Q. Did you resign?

A. I resigned.

Q. Now, Mr. Lonergan, are you here under subpoena of this Court?

A. Yes, sir.

Q. Have you previously testified in previous proceed- [fol. 1149] ings in this cause under subpoena from the defendants?

A. Yes, sir.

Q. Did they at that time place you on the witness stand and examine you?

A. Yes, sir.

Q. When were you served a subpoena in this proceedings?

A. Yes, sir. Yesterday, sir.

Q. Now, Mr. Lonergan, would you tell us where you were on May 17, 1956?

Mr. Evans: Excuse me. I think this would probably be an appropriate point at which to raise my objection, Your Honor.

The Court: You may make the record.

Mr. Evans: Do you wish me to repeat the statement I made?

The Court: He asked him where he was.

Mr. Evans: May 17, 1956.

The Court: You may make your record.

Mr. Evans: Well, I think I should do it at this time, Your Honor. I will object to further questioning of Mr. Lonergan if the answer seeks to elicit information regarding his activity as deputy district attorney in connection with the raid of May 17, 1956, at 2409 Southeast Main Street for the reason, as I have previously stated that Mr. Lonergan was originally a party to the civil suit, appeared [fol. 1150] at the order to show cause and at that time made the recitations that I stated a moment ago.

The Court: For all I know he was in Timbuktu. He may answer the question.

By Mr. Luckey:

Q. Where were you, Mr. Lonergan, on May 17, 1956?

A. I was in the State of Oregon.

Q. What state?

A. Oregon.

Q. Did you remain in Oregon for the next few days?

A. No, sir.

Q. Where did you go?

A. I went to the United States Naval Base, Sand Point, Washington.

Q. What was the purpose of your going to the Navy base?

A. I was taking my two-week training duty.

Q. In what capacity?

A. I was assigned as an assistant legal officer at the air station at Sand Point.

Q. Are you in some sort of military reserve?
A. (Witness nods head.)

The Court: May I interrupt, please? I didn't count on the construction of a building going on. I think we will have to close the windows.

By Mr. Luckey:

Q. Do you have some military reserve status, Mr. Lonergan?
[fol. 1151]
A. Yes, Mr. Luckey. I am in the Naval Reserve.
Q. In what capacity?
A. Do you want my rank?
Q. If you please.
A. I am a Lt. Commander.
Q. Now, when did you go to Sand Point?
A. I believe I left Sunday. Let me see, I have a calendar here. I could comput it from that. 1956. That would be about the 20th of May.
Q. Now, when did you next return to Oregon?
A. I returned to Oregon on the night of the 22nd. That would be Tuesday night.
Q. How long did you remain in Oregon?
A. I remained for two days and I left again for my—to the naval station on the afternoon of the 24th. That was Thursday.
Q. That would be Thursday?
A. Thursday, yes, sir.
Q. What did you do on—

Mr. Crawford: I didn't get those dates, Mr. Lonergan. May 20th you left and returned on May 22nd. When did you leave again, sir?
The Witness: On the 24th of May, Thursday.
Mr. Crawford: 24th. Thank you.

[fol. 1152] By Mr. Luckey:

Q. What did you do on Wednesday, Mr. Lonergan?
A. Wednesday morning I went into the District Attorney's office. Do you want the rest of it or—
Q. Yes. What did you do there, sir?

A. Wednesday morning I told Deputy Sheriff Minielly to bring the tapes to the grand jury room.

Mr. Evans: Excuse me, Mr. Lonergan. At this point, your Honor, I will now again interpose the objection because it appears that this testimony is within the limits of the temporary restraining order now in effect. Temporary injunction, I should have said—page 3, line 4, for the reasons that I have previously stated. And if the Court wishes I'd be glad to state them again.

The Court: I take it that you have reference to subparagraph B?

Mr. Evans: That's correct, your Honor. And, C.

The Court: Wherein—the Court has read it in the record before. "From giving testimony with respect to any of the items that were allegedly illegally seized in said search and, particularly, any tape or wire recordings or a Minifon wire recorder or the spools containing such tape or wire seized at or about said time and place."

Now, in order for this Court to be advised this Court will have to determine before it rules upon the effect of [fol. 1153] this order whether or not this witness has any knowledge of the articles allegedly seized at any particular place.

Mr. Luckey: There will be some indication.

Mr. Evans: He asked questions about it and I assumed he wouldn't be asking questions about it unless, at least, Mr. Luckey thought he had some knowledge about it.

The Court: It isn't the inquiry of what Mr. Luckey thinks about it, it's what this witness knows about it.

Mr. Evans: He started and he got as far as he told him to bring the tape, and that's when I interposed my objection.

The Court: I understand, Mr. Evans. Well, I will lay the foundation for you, sir.

I hand to you what has been delivered to the Court as Trial Exhibit 14. You may be seated.

The Witness: Thank you, Your Honor.

The Court: And I ask you to look at it and advise yourself about it and then advise all of us here whether or not you have had any prior notice of that order prior to today and under what circumstances.

(At this point the witness read the document.)

The Witness: Your Honor, I have never previously seen this order.

The Court: Now, you may inquire of the witness if you wish.

[fol. 1154] By Mr. Evans:

Q. Mr. Lonergan, were you able to hear where you were standing the brief statement I made?

A. I don't think so, sir.

Mr. Evans: Sometimes I know my voice drops.

Q. Well, just briefly, you were served or had knowledge of the order to show cause that was returnable, I think, Monday, April 15th, at 2:00 P.M. before Judge Redding?

A. You advised me of it in the office and I appeared in court, then. I never was served with any paper.

Q. They never did effect a service on you?

A. Never did.

Q. Well, you appeared, I think the Judge referred to it, in your proper person, as I remember correctly.

A. (Witness nods head.)

Q. At that time you stated that you had been made a party and I had forgotten it until tonight. I think you mentioned that you were out of the State at the time this raid occurred?

A. No; that wasn't true.

Q. That wasn't mentioned then?

A. No. I didn't mention that, and that is not the fact.

Q. All right. But you did mention that—something to the effect that you had not been subpoenaed, that you didn't expect to be subpoenaed, and that as far as you know you didn't know anything about the facts surrounding the raid, or some general statement of that kind?

[fol. 1155] A. Well, not precisely. I think—

Q. Well, supposing you give me your recollection of it.

A. My recollection of it is that I said that I hadn't been subpoenaed; that the U. S. Attorney had told me he did not intend to subpoena me; that I had not taken part in

the raid and that I didn't know anything to which I could testify on this trial.

Q. I see.

A. I didn't know that any problem of tracing the custody of the tapes would arise.

Q. Identity. And, was there, following that, a three-way discussion between you and me and the Court?

A. Yes, Mr. Evans.

Q. About dismissal?

A. Yes, Mr. Evans.

Q. At that time did I say we would be glad to dismiss as to you on that representation and on the understanding that if you were subpoenaed you would notify Judge Redding?

A. (Witness nods head.)

Q. And we would be given an opportunity to join you?

A. That's correct.

Q. I assume you have notified or did notify the Judge after you returned the subpoena?

A. I have done so, Mr. Evans.

Mr. Evans: That's all the foundation.

[fol. 1156] The Court: Now, I would like to have the question that was presented to the witness.

By Mr. Evans:

Q. Perhaps I should have asked you, did you make any effort to notify my office?

A. No, Mr. Evans.

Mr. Evans: As I say, I think probably more than a simple objection, I think I should suggest that further questioning be postponed until we have had an opportunity to again join him as a party defendant and have him served with a restraining order. Although, I think the record now shows that he has knowledge of it. And I suppose as an officer of the Court he would be bound by it as an officer.

The Court: Let the record show your statements.

The Witness: Perhaps I am mistaken but I—it didn't apply to me, did it?

Mr. Evans: No. I think you are technically correct. It directed the defendants above-named save and except the defendant, Howard Lonergan, and all others, and State and County officers and officials having knowledge of the order. I think, actually, I believe that's correct, Mr. Lonergan.

(At this point previous proceedings were read by the Court Reporter as follows: "Q. What did you do on Wednesday, Mr. Lonergan? A. Wednesday morning I went [fol. 1157] into the District Attorney's office. Do you want the rest of it or— Q. Yes. What did you do there, sir? A. Wednesday morning I told Deputy Sheriff Minielly to bring the tapes to the grand jury room.")

The Court: I will say to you, Mr. Lonergan, as a witness in this Court, that the Court has been advised of the issuance of the order by the Circuit Court of the State of Oregon for Multnomah County, a copy of which has been shown to you and you acknowledge having read. Shortly after the occasion this Court was advised that the Circuit Court of the State of Oregon mentioned was going to issue the order and I think probably in fact had issued a temporary order, stated in open court that this Court was of the opinion that so far as that order attempted to interfere with the processes and, particularly, the commanding of witnesses to appear before this Court under subpoena and give testimony was null and void so far as these proceedings were concerned.

This Court has, since that time, abided by that decision and now does so. Therefore, the Court is about to direct you to answer any question that may be proposed to you by counsel with the approval of the Court and if you fail to answer, under penalty of contempt proceedings.

Now, at this time if you wish I want to give you an [fol. 1158] opportunity to advise yourself if you desire.

The Witness: No. I am satisfied that the Supremacy Clause of the Constitution applies.

The Court: Well, then, on that basis alone and avoiding the position that the defendant has taken that you are not technically a party of this I will assume for the sake of this argument that you are a party to this order. Therefore, I will order you to answer such questions as are propounded to you by counsel with the approval of the Court.

The Witness: Yes, Your Honor.

Mr. Crawford: Just for the sake of the record, Your Honor, I will object.

Mr. Fallgren: We would also on behalf of the defendant Clark like a continuing objection to testimony concerning this raid and this material on the basis that was raised in our motion to suppress and that we have raised prior hereto in that relation.

The Court: Well, of course I understand your objection now. I understand from this witness he has disclaimed any knowledge of the search and seizure. So, he can't testify as to that.

Mr. Fallgren: Except, Your Honor—

The Court: But, I understand your objection to it as you have mentioned.

Mr. Fallgren: Basically, the fruits of the search and [fol. 1159] seizure.

* * * * * * *

[fol. 1195] Claude F. Cross, produced as a witness in behalf of the Government, having been first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Morrell:

Q. I didn't understand your name, Mr. Cross. Would you state it fully, please?

A. Claude F. Cross.

Q. Where do you reside?

A. 7625 Southeast 19th; Portland.

Mr. Crawford: A little louder, Mr. Cross.

Mr. Morrell: Do you want it repeated, Mr. Crawford?

Mr. Crawford: No. Just the next question.

By Mr. Morrell:

Q. What is your occupation?

A. I am an Oregon State police officer in grade of lieutenant.

Q. Are you stationed at any particular office with the Oregon State Police?

A. I am attached to headquarters staff at Salem, but I reside and work out of Portland.

Q. How long have you been a State police officer?

A. Eighteen years.

Q. Were you a State police officer continuously through 1956?

Mr. Luckey says he can't hear you. So, will you bring it out a little louder? I will restate the question.

[fol. 1196] Were you a State police officer continuously through 1956; the entire year?

A. Yes, sir.

Mr. Morrell: Now, I want at this point to have the witness handed Exhibits 1, 1-A and -B, 2-A and -B, and so forth on down, 3, 5, and the subdivisions of 5.

Then I am going to ask you a question regarding these exhibits. Before you answer that question I believe there are some preliminary matters that should be taken up with the Court.

Q. Will you please examine those exhibits that you have just been handed before I ask you the question about it? After you have looked at the boxes and reels I would like you to look at those little papers that are separate from the boxes. Now, you have been handed two extra reels also, Mr. Cross, which I believe—

Mr. Evans: I can't hear the question.

By Mr. Morrell:

Q. I said, you have been handed two extra reels I believe, also, Mr. Cross. Now, having looked at those would you look at the little slips of paper? I believe you looked at those other two.

The Court: Would you please hold your voice up?

Mr. Morrell: I am sorry, Your Honor. I will certainly try to.

[fol. 1197] Q. Have you looked at those exhibits, Mr. Cross?

A. Yes, sir.

Q. Did you see those exhibits or any of them during the month of May, 1956?

Mr. Evans: Excuse me. I object at this time, Your Honor, on the grounds that Mr. Cross is one of the defendants who is named in Civil Action Number 238958 now pending in the Circuit Court, State of Oregon for the County of Multnomah in which the temporary restraining order has been issued and is one of the defendants restrained by the order, a copy of which has been introduced in evidence in this court.

Mr. Crawford: The defendant Clark joins in that.

The Court: Would the Clerk please attach to the Court record of cause Trial Exhibit 32 which appears to be the original subpoena issued in this Court on this witness Lieutenant Claude Cross and another that purports to show the Marshal's return of service thereon on April 12, 1957?

(At this point a document purporting to be a United States District Court subpoena issued to Claude Cross, Oregon State Police, Milwaukie, Oregon, was marked for identification and received in evidence as Court's Exhibit 32.)

The Court: Lieutenant, I hand you what has been produced in court and received in evidence as Exhibit 14 [fol. 1198] which is a certified copy of a certain order entered by the Circuit Court of the State of Oregon for Multnomah County under date of April 16th last in which you're named and you appear to be one of the named defendants in the cause. It purports to restrain you from giving evidence in this cause. Have you seen that order before? You may read it and orient yourself.

The Witness: I have read a certified—or, a photostatic copy of it.

The Court: In other words, you are acquainted with the order as it now stands?

The Witness: Yes, sir.

The Court: Well, so that you may be advised, Lieutenant, this Court upon being advised that the circuit court men-

tioned was of the mind to issue the order and subsequently after the order was issued stated in open court that this Court considered that so far as that order purported to prohibit any witness named therein from giving testimony in this cause pursuant to subpoena of this case was null and void so far as this Court was concerned in these proceedings. And, the Court has subsequently considered the matter and still abides by that conclusion. Having read into the record that you have been officially subpoenaed in this cause, the Court will advise you that it is the intention of the Court that if you refuse to answer any question that is [fol. 1199] propounded to you by counsel with the consent of the Court that the Court will consider the matter contemptuous and deal with the matter accordingly.

Now, have you had an opportunity or do you wish an opportunity to be advised of your duties and responsibilities in the matter?

The Witness: I believe I understand it, sir.

The Court: Well, then, with that in mind the Court will order you, then, to answer such questions as have been propounded. And, I believe there has been one question propounded to you. You are requested to answer it.

Mr. Morrell: Well, before he does answer that question, Your Honor, I think as we did with the other witnesses there are a couple of preliminary questions that I would like to ask him.

The Court: Well, then, for the sake of the record I request you withdraw the question.

Mr. Morrell: I withdraw the question asked.

The Court: Thank you.

By Mr. Morrell:

Q. Mr. Cross—

Mr. Fallgren: May I interrupt, Your Honor, to save an interruption after getting into the meat of this? We also want the record to show our objection is based upon the bases for our motion to suppress, so the Court understands that.

[fol. 1200] The Court: I am sure I understand the defendants' position in the matter.

By Mr. Morrell:

Q. Mr. Cross, previously in this case did you appear and give testimony regarding these matters?

A. Yes, sir.

Q. Did you appear on subpoena?

A. Yes, sir.

Q. By whom were you subpoenaed?

A. I believe, the Elkins and Clark.

Q. The defendants?

A. Yes, sir.

Q. All right. Now, going back to this question that was asked just before the objection, I believe I asked you: Did you see these exhibits which you have examined or any of them during the month of May, 1956?

The Court: Give counsel a chance to make their objection.

Mr. Evans: If the Court please, I object and renew my former objection which I'd be glad to state if the Court desires.

The Court: Very well.

Mr. Evans: Do you want me to restate it?

The Court: I am sure I understand.

Mr. Evans: I would like to ask Mr. Cross as to what proceedings he referred to. When?

[fol. 1201] Q. That, of course, was taking testimony on the motion to suppress filed in Federal court and it was heard up in the courtroom on the seventh floor?

A. That—that is right, yes, sir.

By Mr. Morrell:

Q. Did you—

Mr. Crawford: I would like to examine on the Court's Exhibit 32 for a moment.

The Court: You may.

Mr. Morrell: I will withdraw my question so Mr. Crawford—

The Court: Well, I think maybe we had better let the question stay in the record so we can present this matter as a matter of record.

Mr. Morrell: Very well.

By Mr. Crawford:

Q. Mr. Cross, according to the Court's Exhibit 32, which is the original of a subpoena which requires you to appear to give evidence upon the trial of this cause, the return of the Marshal shows that the subpoena was served upon you on April 11, 1957.

Pardon. It was served on April 12, 1957. Is that correct?

A. I am not sure what day it was, sir.

Q. Well, the United States Marshal serving the subpoena has drawn a line through the words "and tendering to H the fee for one day's attendance and the mileage allowed by law."

I don't understand the rules, Your Honor. I don't know [fol. 1202] what the rules are in that regard.

The Court: Well, do you wish to advise yourself?

Mr. Crawford: Well, I just wanted to ask him.

Mr. Evans: I wonder if Mr. Witty would hand me that.

Mr. Crawford: The reason being, Your Honor—

Q. Mr. Cross, I subpoenaed you on behalf of Mr. Clark and Mr. Elkins on the motion to suppress, did I not?

A. Oh, I presume you did. I don't know for sure who subpoenaed me.

Q. You appeared as a witness on behalf of the defendants in that proceeding?

A. Yes.

Mr. Crawford: All right.

Mr. Morrell: Do you have any further questions?

Mr. Crawford: No further questions.

By Mr. Morrell:

Q. Mr. Cross—

The Court: Now, in view of that record the Court still abides by its instructions it gave you.

The Witness: All right.

Mr. Fallgren: Do I understand, Your Honor, that we have a continuing objection to all of these questions?

The Court: Yes.

[fol. 1241] VAYNE M. GURDANE, produced as a witness on behalf of the Government, being first duly sworn by the Clerk, was examined and testified as follows:

Direct examination.

By Mr. Morrell:

Q. Mr. Gurdane, I think you stated your name loud enough for all the jury to hear it. What is your occupation?

A. Captain, Oregon State Police.

Q. How long have you been with the Oregon State Police in any capacity?

A. Since August 1, 1931.

Q. I assume, then, you were with the Oregon State Police during the year 1956 continuously?

A. Yes, sir.

Q. Where do you reside, Mr. Gurdane?

A. 2829 Southeast Belmont; Portland.

Q. Are you attached to any particular office or subdivision of the Oregon State Police?

A. Captain, District Number 1.

Q. Where is the headquarters of District Number 1?

A. Milwaukie, Oregon.

Q. The District Number 1, does that include Portland, Oregon, as well?

A. Yes, sir.

Q. Now, Captain Gurdane, I am going to ask that the [fol. 1242] Bailiff hand you what has been marked previously as Government's Exhibits 1 through 5 with the various subdivisions being boxes, reels of tape, and little notes.

A. Your Honor—

Mr. Morrell: Well, before I ask you the question, Captain, I would just like to have you examine those and then I will ask you a question and then I will pause and then we will have you—

Mr. Evans: Will you also object, Captain?

By Mr. Morrell:

Q. Would you examine those exhibits that have been handed you? I believe there are two additional reels there, five boxes containing reels of tape recordings and several little notes. Just look them over.

Now, I will ask you the question did you ever see those before?

Mr. Evans: Now, excuse me. Your Honor, the way the question is asked it is general but at this time on behalf of both Mr. Crawford who has stepped out of the room and myself I would like to object to any questions being asked this witness concerning Government's Exhibits 1 to 5, any of the sub-letters, on the ground and for the reason that Captain Gurdane is one of the defendants in the temporary restraining order and on the further objections that have been noted here.

The Court: Captain, I hand you what has been marked— [fol. 1243] The Witness: I have been served, Judge. I have one.

The Court: Then, you are acquainted with the Circuit Court of the State of Oregon for Multnomah County entered on April 15th last wherein you are one of the defendants?

The Witness: Yes, sir.

The Court: And, it purports to restrain you from giving any testimony in this present cause pending in this court. You are acquainted with that?

The Witness: Yes, sir.

The Court: The Court was advised of the contemplation of the entry of that order and later was advised of the fact that it had been entered. And, this Court then, after considering the matter, read into the record that this Court considered, so far as these proceedings were concerned, that this order of the Circuit Court mentioned was null and void and of no force and effect so far as it purported to prevent any witness from giving any testimony in this cause pursuant to subpoena issued herein.

The Court has had occasion to consider that matter since and the Court as of this morning still abides with that conclusion. Therefore, I will have to advise you that you must

answer under order of this Court any question that shall be propounded to you by counsel with the approval of the Court under threat of contempt proceedings if you fail to answer.

[fol. 1244] Now, have you had an opportunity or do you wish an opportunity now to advise yourself concerning your rights and your duties?

The Witness: I have had an opportunity, Your Honor.

The Court: Very well. Then, this Court will order you to answer such questions as are propounded to you by counsel.

The Witness: Yes, sir.

* * * * * * * *

[fol. 1265] JAMES C. DARBY, produced as a witness in behalf of the Government, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Morrell:

Q. You have just stated your name for the Reporter as James C. Darby. What is your occupation, sir?

A. I am a sergeant of the State police.

Q. Sergeant Darby, how long have you been with the State police?

A. Twenty years.

Q. Are you attached to any particular office of the State police or any subdivision of it?

A. I am stationed at the Salem patrol office.

Q. Now, I assume that you have been a State police officer continuously through 1956; is that correct?

A. Yes, sir.

Mr. Morrell: I would like to have this witness handed Exhibits 1 through 5 with the various subdivisions and the little notes that have been—

Q. Where do you live, Sergeant?

A. In Salem.

Q. In Salem?

A. Yes, sir.

Mr. Morrell: The Clerk will now hand you what has been [fol. 1266] admitted as Government's Exhibits 1 through 5, two additional reels. They are empty. And some slips of paper. I would like before I ask you any questions about these you to look them over, please.

The Witness: Your Honor, I am under restraining order from the State court.

Mr. Evans: I think Mr. Darby is not named specifically, but he would come within the category of other State and County officials. For that reason I will enter the same objection that I did with Captain Gurdane and Lieutenant Cross.

Mr. Morrell: Perhaps I should ask you one additional question.

Q. Did you—do you appear here pursuant to a subpoena issued by this Court?

A. I do.

The Court: Mr. Darby, I hand you what has been offered in the record in this cause as Exhibit Number 14 which is agreed to be a copy of the order of the Circuit Court of the State of Oregon for Multnomah County wherein it states that the named defendants and including any other officers of the State of Oregon are purportedly restrained from giving any testimony in this cause. Is that the order you had reference to?

The Witness: Yes, sir.

[fol. 1267] The Court: I take it you are acquainted with it?

The Witness: Yes, sir.

The Court: I would like to advise you that during the contemplation of the issuance of that order this Court was advised of the proceedings pending in the court and after it was actually entered this Court, having concluded the matter, stated in the record that so far as this Court was concerned in these proceedings that that order was null and void so far as it attempted to prohibit any witness giving testimony in this cause pursuant to subpoena of the Court. This Court has had the matter several times before it and as of this instant it still abides by that position.

Therefore, I will have to advise you that if you refuse to answer any question that may be propounded to you by counsel with the consent of Court that this Court will then entertain such contempt proceedings as appear to be appropriate.

Now, have you had a chance to be advised of your duties and responsibilities in the matter?

The Witness: No, sir.

The Court: Do you wish an opportunity to be advised?

The Witness: I do not.

The Court: Well, then, under those circumstances the Court will now advise you that when the ruling is called [fol. 1268] for the Court will order you to answer any question presented to you by counsel.

The Witness: All right.

. . . . . .

[fol. 1389] William M. Langley, produced as a witness in behalf of the plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct examination.

By Mr. Luckey:

Q. Would you please tell the Court your name, sir?

A. William M. Langley.

Q. Where do you live, Mr. Langley?

A. Portland, Oregon.

Q. How long have you lived here?

A. I was born in Portland.

Q. What is your occupation?

A. Well, I am District Attorney, Multnomah County, Oregon.

Q. How long have you been so employed?

A. Since January the 3rd, 1955.

Q. Now, Mr. Langley, during the course of your duties did you have any activity in connection with certain tape recordings allegedly found in the home of the defendant, Raymond Clark?

A. Well, I executed an affidavit which was the basis for a warrant for the search of Mr. Clark's house.

Mr. Evans: Your Honor, I think—Your Honor, excuse me. I was looking through my briefcase. This would be an appropriate time to enter our objection to any testimony about that in view of the State court injunction to which [fol. 1390] Mr. Langley was a party under which he is subject to a temporary restraining order.

The Court: Mr. Langley, here is an exhibit; 14, I believe it is. It has been received as part of the records in this matter and it has been stipulated that that is a copy of the order of the Circuit Court of the State of Oregon for Multnomah County wherein the defendants therein named, including yourself, have been purportedly restrained from giving testimony in this cause pursuant to subpoena from this Court. The Court was advised of the contemplation of that order and later was advised of the actual execution and entry of the same at which time this Court stated into the record, after having concluded the matter, that this Court was of the opinion that that order, so far as it attempted to prevent anybody from acknowledging subpoena or process of this Court, was null and void.

The Court has considered the matter since then and it still abides by that decision. So, I wish to advise you that in line with that the Court will order you to answer any questions that may be propounded to you by counsel with the approval of the Court.

Now, have you had an opportunity—or, do you wish time to be advised of your duties and obligations in the matter?

The Witness: I accept Your Honor's ruling.

[fol. 1391] The Court: Very well. Then, I will order you, then, for the record, to answer the questions.

[fol. 1903] COLLOQUY

Mr. Evans: Now, at this time, Your Honor, we would object to receipt into evidence of Government's Exhibits 1 to 5 which, I understand, are the reels of tapes, for the reason and upon the ground, first, that there has been insufficient identification; second, that there is insufficient evidence of the chain of custody; third, that even in and of themselves they do not constitute evidence of a corpus delicti; although I am frank to concede they might be one element if properly coupled up or identified with other testimony; fourth, that there has been no connection shown here between those exhibits and my client, the defendant James Butler Elkins or for that matter with either or both of them; fifth, the fact that it now appears—I say now. Perhaps I should say that we renew our objections to their [fol. 1904] receipt on the grounds that they are the fruits of an illegal search and seizure.

There has been the additional evidence, however, that this Court did not have before it, as far as I know, that Mr. Langley, apparently, had discussed the matter of telephone taps or alleged telephone taps with the F.B.I. He was vague, as I recall it, as to whether or not he had mentioned Mr. Elkins' name. He didn't think he had but he wouldn't say flatly or positively he had not. I think that is a fair statement of his testimony in that respect.

. . . . . .

[fol. 1909] Mr. Evans: Now, on the illegal search and seizure, we simply renew our position on this. Your Honor has heard so much about it I don't know whether you would want to hear any more. This was certainly an illegal State search and seizure. And, it appears to me that there is, perhaps, enough cooperation or—I don't mean anything sinister by that—but, there was enough involvement of the F.B.I. by reason of the District Attorney's prior consultation with them, by reason of the deputy sheriff's playing them for them Monday—or, was it Tuesday? I am mixed up on my dates now. In any event, it would cast some doubt on the propriety of the search and seizure even under the Federal rule. Of course, we stated that this Court should be bound to follow the facts stated under the Rea case.

Mr. Crawford: May it please the Court, the defendant Clark also objects to the introduction of Government's Exhibits numbered 1 to 5, inclusive; the box and the reels. Well, I just wish to address myself only to the reels containing the actual tape.

. . . . . .

[fol. 1917] Mr. Crawford: Here is another circumstance which it seems to me is just unanswerable. Your Honor knows that the law of the State of Oregon provides that when a search is made upon the premises of anyone that [fol. 1918] the person making the search and taking therefrom personal property shall leave with the person from whom he took the property or with someone upon the premises a receipt for the properties that he took. And, I submit that was never done. It simply wasn't done.

. . . . . .

[fol. 1932]
The Court:

. . . . . .

[fol. 1936] Now, so far as the defendant Elkins is concerned there are still gaps in the course of the trial that the Government will have to hurdle before they have been entitled to go forward to the jury on each and all of the counts. And, I won't now give the Court's impression as to which one of those—but, I just make the comment that there is still part of the case to be tried. But, I think all in all on the question of identification of the objects which the Government contends were taken from the possession of the defendant Clark, it is sufficient to enter the objects as prima facie evidence on the admissibility. The weight to be given those tapes, whether or not they have been altered, and that sort of thing, is up to the jury. So, the objects for introduction, Exhibits 1 through 5, inclusive, being the reels and the tapes wound thereon and the boxes will be received in general evidence and the objections thereto will be overruled.

. . . . . .

[fol. 1937] (At this juncture Government's Exhibits 1 through 5, inclusive, and 1-A, 2-A, 3-A, 4-A, 5-A, sub-4 and sub-5 were received in evidence.)

• • • • • • •

[fol. 2468] The Court: Then, I think the Court has indicated that the alleged overt acts 1 and 2 would be withdrawn from consideration by the jury and that Counts 3 and Counts 4, being the alleged conversations of Thomas E. Maloney with the individual referred to as Joey, and the other individual referred to as Ricky, will be withdrawn from the jury. Not only is there considerable doubt in the Court's mind as to identity of those other parties, there is the very serious question of whether or not the consent of one party to the conversation is sufficient to remove it from the unlawful purpose designated in the statute. Inasmuch as the several circuits cannot agree amongst themselves as to what the proper rule in that would be, I am not going to submit it to the jury.

Now, I think for the benefit of the record for the respective defendants that except as now just ordered each and all of the motions made on behalf of each of the defendants [fol. 2469] will be overruled.

(After exceptions to the Judge's ruling and further discussion the Court adjourned at 3:25 o'clock P.M., to reconvene at 9:30 o'clock A.M., May 10, 1957.)

• • • • • • •

[fol. 2541]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT 8-1

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

STATE OF OREGON)
) ss
County of Multnomah)

I, Ronald E. Sherk, being first duly sworn, depose and say that I am a Special Agent for the Federal Bureau of Investigation and reside at Portland, Oregon; that heretofore, on May 22, 1956, in the State and District of Oregon, I listened to portions of electronic tape recordings of conversations, which recordings contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, Section 605, U. S. C. A. I am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one Minifon recording machine and four spools of Minifon recording machine wire, which said properties containing evidence of such recorded intercepted telephone conversations are located in Safety Deposit Box 912 at The First State Bank Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive they are so situated.

/s/ Ronald E. Sherk

Subscribed and sworn to before me this 5th day of September, 1956.

/s/ Claire Mundorff
United States Commissioner

(Seal)

Endorsed:
Filed September 5, 1956
R. DeMott, Clerk
By C. Mundorff, Deputy.

[fol. 2542]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT 8-2

SEARCH WARRANT

To: Ronald E. Sherk, Special Agent, Federal Bureau of Investigation, or any other authorized Special Agent of the F. B. I.

Affidavit having been made before me by Ronald E. Sherk, Special Agent of the Federal Bureau of Investigation, that he is positive that on the premises known as The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon, in Safety Deposit Box 912 of said bank, there is now being concealed certain property, namely five (5) electronic tape recordings, one (1) Minifon recording machine, and four (4) spools of Minifon recording machine wire, which properties are believed by the said Ronald E. Sherk to contain intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, Section 605, U. S. C. A., and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist;

YOU ARE HEREBY COMMANDED to search forthwith the place named for the properties specified, serving this warrant and making the search at any time in the day or night, and if the properties be found thereto seize the same, leaving a copy of this warrant and a receipt for the properties taken, and prepare a written inventory of the properties seized and return this warrant and bring the properties before me within ten days of this date, as required by law.

Dated this 5th day of September, 1956.

/s/ Claire Mundorff
United States Commissioner

(Seal)

Endorsed:
Filed September 5, 1956
R. DeMott, Clerk
By C. Mundorff, Deputy.

[fol. 2543]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT 8-3

I have received the attached search warrant Sept. 5, 1956 and have executed it as follows:

On September 5, 1956, at 3:15 pm o'clock, I searched the premises described in the warrant and I left a copy of the warrant with Robert Franz, Manager, First State Bank of Milwaukie, at the place of search, together with a receipt for the items siezed.

The following is an inventory of the property taken persuant to the warrant:

5 electronic tape recordings

1 Minifon recording machine

3 spools of Minifon recording machine wire.

This inventory was made in the presence of J. Eldon Dunn, Special Agent, FBI, Portland, Ore. and Capt. Vayne M. Gurdane, Oregon State Police, Milwaukie, Oregon.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Ronald E. Sherk

Subscribed and sworn to and returned before me this 5th day of September, 1956.

/s/ Claire Mundorff
U. S. Commissioner.

(Seal)

Endorsed:
Filed September 5, 1956
R. DeMott, Clerk
By C. Mundorff, Deputy

[fol. 2544]

Defendants' Exhibit 14

Clerk's Note

Defendant's Pre-Trial Exhibit 14, is the Temporary Restraining Order entered by the Circuit Court of the State of Oregon for the County of Multnomah in *Elkins et al.* v. *Minielly et al.*, No. 238-958, and is identical with the exhibit in the Ninth Circuit Proceedings, *Re Petition of Elkins & Clark, etc.*, No. 15522, printed side folio 536, printed page 301.

[fol. 2547]

Defendants' Exhibit 15

In the District Court of the State of Oregon For the County of Multnomah

---

In the Name of the State of Oregon

To any Sheriff or Constable or other Peace Officer of the County of Multnomah, and State of Oregon, GREETING:

Information, on oath, having been this day laid before me that certain obscene photographs are in the possession of Raymond Clark at or about 2409 S.E. Main Street, in the City of Portland, County of Multnomah, State of Oregon, being a large house next to two vacant lots, with intent to exhibit the same in violation of O.R.S. 167.150. You are therefore hereby commanded to make immediate search at any time in the day or night of the premises and entire building of Raymond Clark at or about 2409 S.E. Main Street, in the City of Portland, County of Multnomah, being a large house next to two vacant lots, for obscene photographs and sound recordings, and if you find the same, or any part thereof to bring it forthwith to me at my office in the Court House, in the City of Portland, County of Multnomah, State of Oregon.

Dated at Portland, this 17th day of May, A.D., 1956.

(sgd) J. R. Mears
Judge.

APPROVED as to Form:

(sgd) William M. Langley
District Attorney.

This search warrant may be executed on Sunday.

(sgd) J. R. Mears
Judge.

(This Search Warrant is VOID, if not executed and returned ten days from the date of issuance.)

[fol. 2548]

64256

IN THE DISTRICT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

SEARCH WARRANT

ENDORSED AS FOLLOWS:
FILED
District Court
May 22 1956
Elmer Bennett, Clerk
Multnomah County

Return Presented to court
at 1:30 PM, 5-22-56.

STATE OF OREGON,
COUNTY OF MULTNOMAH, *ss.*:

I HEREBY CERTIFY, That I received the within Search Warrant on the 17th day of May, A.D., 1956, at 8:30 o'clock P.M. of said day, and executed the same on the 17th day of May, A.D., 1956 at 2409 S.E. Main Street, Portland, in said county and state, by entering upon the premises described therein and making diligent search for the property described therein, and I found upon the said premises pursuant to said warrant no obscene and indecent photographs with accompanying sound recordings.

Terry D. Schrunk
Sheriff of Multnomah County, Oregon

By (sgd) G. MINIELLY
Deputy.

Return made in open court this 22 day of May, 1956.

.....
Judge.

STATE OF OREGON,
COUNTY OF MULTNOMAH, *ss.*:

I, George Minielly, the officer by whom this warrant was executed, do swear that the above or attached inventory contains a true and detailed account of all the property taken by me on the warrant.

(sgd) G. MINIELLY

Subscribed and sworn to before me this 22 day of May, 1956.

(sgd) J. R. MEARS
District Judge.

[fol. 2549]

DEFENDANTS' EXHIBIT 16

IN THE DISTRICT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

In the Matter of the Inventory of Property Seized from premises located at 2409 S.E. Main Street, in the City of Portland, County of Multnomah, State of Oregon.

RECEIPT

At the premises of Raymond Clark, which are located at 2409 S.E. Main Street, in the City of Portland, County of Multnomah, State of Oregon, I observed the crime of possession of slot machines and seized 26 slot machines. I observed evidence of the crime of wiretapping and seized the following property:

31 spools of wire recordings in 4 boxes
24 party records
1 Protona portable tape recording, Serial #19838
1 payroll book
1 "Kodoscope" Eight, Model 70, projector
6 spools of wire recordings in paper sack
7 reels of 8 mm. film in cans
6 " of 8 mm. " without cans
3 " Castle children's films
2 French telephones
1 pre-amp., Serial #188519
1 set head phones & wire, make "Brandes"
1 amplifier speaker, #406545
2 short lengths of wire
5 small boxes containing tape recordings

After entry had been made into the above premises, the property listed was observed and seized.

This property is being held for the Multnomah County Grand Jury.

Terry D. Schrunk
Sheriff of Multnomah County, Oregon

By (sgd) G. Minielly

[fol. 2550]

DEFENDANTS' EXHIBIT 17
Case No. 18321

At 2409 S.E. Main St. Mult. County Sheriff's Office. Received of Ray Clark May 17, 1956, 11:30 P.M. the following listed items—

31 spools of wire recordings in four boxes.
24 party records
1 Protona portable tape recorder Serial #19838
1 Payroll book
1 "Kodoscope" Eight Model 70 projector
6 spools of tape recordings in paper sack.
9 stand up type slot machines
17 table style Slot machines
7 reels (8 mm.) in cans.
6 (8 mm.) reels minus cans
3 reels "Castle" children's film.
3 French telephones
1 pre amp #188519
1 set head phones & wire—make "Brandes"
1 amplifier speaker #466545
2 short lengths of wire

Dep. G. Minielly

Terry Schrunk
Sheriff
Multnomah County

[fol. 2551]

DEFENDANTS' EXHIBIT 20

(Emblem)

MULTNOMAH COUNTY SHERIFF'S OFFICE

TERRY D. SCHRUNK
Sheriff and Tax Collector

Court House :

Portland 4, Oregon :

Telephone CApitol 7-8441

May 28th, 1956.

Received of Terry D. Schrunk, Sheriff of Multnomah County, Oregon.

The following articles obtained in raid at 2409 SE Main St., on May 17th, 1956:

32
~~31~~ Spools of Wire Recordings in 4 boxes, *plus 1 unwound Spool*
24 Party Records
1 Protona Portable Wire Recording, Serial #19838
1 Payroll Book
1 Kodoscope—Eight, Model 70, Projector—#*22798*
6 Spools of Wire Recordings in Paper Sack
5
~~7~~ Reels of 8 mm. Film in Cans
6 Reels of 8 mm. Film without cans
3 Reels Castle Children's Films
3 French Telephones
1 Pre-Amp., Serial #188519
1 Set Head Phones & Wire, make—"Brandes"
1 Amplifier Speaker, #406545
2 Short Lengths of Wire
5 Small Boxes containing Tape Recordings

Dated at Portland, Oregon, this 28th day of May, 1956.

/s/ ROBERT Y. THORNTON

Italicized material handwritten corrections.

[fol. 2552]

DEFENDANTS' EXHIBIT 21
No. C-18321

IN THE DISTRICT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

No. 64256

STATE OF OREGON, on the Relation of
WILLIAM M. LANGLEY, Plaintiff,

—vs.—

RAY CLARK, Defendant,

—and—

SONNY MARTIN, Ancillary Defendant.

Transcript of Testimony

Hearing held in the District Court of the State of Oregon for Multnomah County on May 21, 22, and 23, 1956 before the Honorable John R. Mears, Judge.

APPEARANCES:

Robert Y. Thornton, Attorney General; Robert L. McKee, Assistant Attorney General; Oscar D. Howlett, Deputy District Attorney; Glenn A. Geurts, Deputy District Attorney.

Charles E. Raymond, Attorney at Law, representing Ray Clark.

Burton J. Fallgren, Attorney at Law, representing Ray Clark.

William J. Crawford, Attorney at Law, representing Sonny Martin.

David Fain, Attorney at Law, representing Michael Frey.

[fol. 2553] Mr. Crawford: I am representing the defendant, Martin, Your Honor.

The Court: You are representing Sonny Martin, isn't that right?

Mr. Crawford: Yes, Your Honor.

The Court: Mr. Burton J. Fallgren and Charles Raymond are representing the defendant, Ray Clark, is that right?

Mr. Fallgren: That's right.

Mr. Raymond: That's right, your Honor.

The Court: And Mr. Robert L. McKee from the Attorney General's office?

Mr. McKee: Yes, Your Honor.

The Court: Now, gentlemen, all I have before me at the present time are the various motions to suppress evidence and return or destroy seized goods. There are two motions: one filed by the named defendant, Sonny Martin; and another one by the defendant named Roy or Ray Clark. I have no return upon the search warrant before me. I have no complaint for violation of law placed before me and have checked with the clerk's office. Mr. Oscar J. Howlett, I believe, is representing the District Attorney's office in this matter.

* * * * * * *

[fol. 2554] The Court: I have before me the Affidavit that was signed by William M. Langley in my presence and sworn to before me by him. For the record let me state that this affidavit and the search warrant were presented to me after two telephone calls about five o'clock on Thursday evening the 17th of May. The affidavit and search warrant were presented about twenty minutes of six by the District Attorney and his Chief Deputy, Mr. Howard Lonergan. Mr. Lonergan had a volume of the code under his arm and I [fol. 2555] was alone in my chambers. I, of course, recognized the District Attorney and his Chief Deputy as the principal officers of this county and lawyers of standing in the community. I glanced over the affidavit; and I say "glanced"; I did not study it because I had relied on the integrity and ability of the District Attorney. After it was sworn to I signed the search warrant and the proceedings that happened thereafter have been laid out at length in this Court.

I feel, gentlemen, that I was misled in signing the search warrant. I was perhaps in error in not meticulously exam-

ining the law and the District Attorney, but I relied upon the legal ability of the gentlemen present and did sign the search warrant. I can see that the search warrant has no greater power than the affidavit which stands behind it. I can see no further reason for continuing a hearing of this case because we always will have to go back to the Affidavit, which is the original, the starting, document which I now find under the state law to be faulty.

Mr. Howlett: Your Honor, you haven't allowed the state to put on any testimony at all or to argue the question.

The Court: You can't change this document. (Indicating document)

Mr. Howlett: It's just as good as gold, Your Honor.

The Court: You can't change the document. Please sit down, Mr. Howlett.

[fol. 2556] Mr. Howlett: Yes sir.

The Court: (Continuing) I have before me an Opinion of Justice Tooze in two cases combined, the State of Oregon vs. Joe Gustafson and State of Oregon vs. Harry Nudleman; and various other decisions, 137 Oregon, 112 Oregon, and I can cite 115 Oregon 187 and 103 Oregon 443, and a few more. Justice Tooze in his Opinion states the law—it is now generally accepted as being the law—that property seized upon an unlawful seizure is inadmissible as evidence against a defendant and such evidence will be suppressed and the property seized returned to the defendant if timely application is made. I have here further a Directive from the Governor of the State of Oregon to the Attorney General to take in all matters pertaining to vice in Multnomah County; of laws relating to gambling, prostitution, perjury, bribery, extortion, intoxicating liquors, narcotics and other allied vicious or corrupt practice by persons or organizations or combinations thereof, and so forth.

I believe that it is proper for me at the present time to indicate that the Sheriff of Multnomah County, as custodian of these various articles, should hold and impound them pending further instructions from the Attorney General and from the Attorney General alone. I believe further that the slot machines as such, being contraband under the State of Oregon, should be destroyed upon perhaps the order of [fol. 2557] the Attorney General.

Mr. Crawford: I'll destroy them upon your order, Your Honor.

The Court: (Continuing) And at the time set by the Attorney General and agreed to by the Sheriff. I believe it would be improper for me in the face of this Directive to return the articles, to allow them to be in the hands of the defendants, or in the hands of the District Attorney.

In effect, gentlemen, I am holding that the search was illegal based upon a faulty warrant, which in turn, of course, was based upon a faulty affidavit. The Attorney General has been informed of the presence, or the location, of the articles. The Attorney General has likewise asked me to rule on this point and he said he would abide by the ruling of the Court; he has asked me to rule and I can see no reason for any further reception of evidence by any party when we have the Affidavit which cannot be changed in any particular and is faulty, and that is the basis for our proceeding.

Mr. Howlett: The Attorney General has come into this situation and has asked the Court in chambers concerning this matter, has discussed it. That's just exactly what we were discussing in the first place; we wanted the Attorney General to tell Mr. Langley in the first place whether he would come in and we wrote him a letter to that effect and asked him.

[fol. 2558] The Court: I have ruled and the Attorney General is here by my request.

Mr. Howlett: I'd like to make this point, Your Honor, that this evidence is not illegal. If it was illegal as to the two parties here, it is not illegal as to Mr. Elkins who is under indictment, and we want this evidence used against Mr. Elkins whom nobody else has had guts enough to arrest yet.

Mr. Crawford: Who is Elkins?

Mr. Howlett: You know who he is.

Mr. Crawford: Me?

Mr. Howlett: All we're interested in is in seeing that this evidence is preserved so that the guilty party can be brought to trial.

The Court: You are not impugning the ability of the Attorney General, or the Sheriff, to properly protect the evidence, are you, Mr. Howlett?

Mr. Howlett: No sir. No sir, I'm not.

The Court: I have directed that the property be impounded and to be handled from here on the instruction of the Attorney General. The Attorney General is now in the courtroom and he understands. (To the Attorney General) Do you understand that?

Mr. Thornton: I understand your Honor's ruling.

Mr. Raymond: It has come out through the proceedings [fol. 2559] here the last two days that copies were made by Doug Baker and Brad Williams and others. I think all copies that have been made should be likewise turned over to the Attorney General.

The Court: The Court will so order it. The Court doesn't know where they are but the Court will so order it, because they would have been improper to have been made of any property that was taken and seized pursuant to a void search warrant.

Mr. Raymond: The officers of the State know what copies have been made and I think the Attorney General should be asked to procure them and the parties holding them should be directed to turn them over. That's the only testimony I had yet to put on. Under pain of contempt, of course.

Mr. Crawford: Your Honor, now, as to these slot machines. We are perfectly willing that the Court make an order directing that they be destroyed, and a further order that they were seized illegally and that they not be used in any further criminal proceeding arising out of this case. We are perfectly willing to concede they are contraband and the Court is perfectly right in ordering them destroyed.

The Court: I believe that I have included that instruction in my finding that they shall be destroyed by the Attorney General and the Sheriff at such time as they see fit.

[fol. 2560]

COURT'S EXHIBIT 19
Marshal's Crim. No. 1982

SUBPOENA TO TESTIFY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA

—v.—

JAMES B. ELKINS and RAYMOND F. CLARK

To George Minielly, Multnomah County Sheriff's Office, Multnomah County Courthouse Portland, Oregon

Terry Shrunk, City Hall, Portland, Oregon

You are hereby commanded to appear in the United States District Court for the District of OREGON at The United States Courthouse in the city of Portland on the 16th day of April, 1957 at 11 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the U. S.

April 11, 1957.

R. DeMott,
Clerk.

By /s/ THORA LUND,
Deputy Clerk.

RETURN

Received this subpoena at Portland, Oregon on April 12th, 1957 and on April 12th, 1957 at Portland, Oregon I served it on the within named George Minielly, personally by delivering a copy to him.

Also by serving, Terry Shrunk, City Hall, Portland, Oregon, personally on April 15th, 1957.

HAROLD SEXTON
United States Marshal

By /s/ GEORGE VRANIZAN Deputy.

(Stamp—U. S. District Court, District of Oregon, Filed: Apr. 18, 1957, R. DeMott, Clerk, By /s/ M. SPARGO, Deputy.)

[fol. 2562]

COURT'S EXHIBIT 29

SUBPOENA TO TESTIFY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA

—v.—

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Defendants.

To Oscar D. Howlett, 4710 SE Long, Portland, Oregon.

You are hereby commanded to appear in the United States District Court for the District of OREGON at United States Courthouse in the city of Portland on the 29th day of April, 1957 at 10:00 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the United States.

April 29, 1957.

R. DeMott,
Clerk.

By /s/ M. CASEY,
Deputy Clerk.

RETURN

Received this subpoena at Portland Ore. on 4-29-57 and on April 29, 1957 at Portland Ore. I served it on the within named Oscar D. Howlett by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.

/s/ HAROLD SEXTON USM

By /s/ MARTIN LAVALLE
Deputy

(Stamp—U. S. Marshal's Office, District of Oregon, Received Apr. 29, 1957, Harold Sexton, U. S. Marshal.)

(Stamp—U. S. District Court, District of Oregon, Filed: Apr. 30, 1957, R. DeMott, Clerk, By /s/ M. SPARGO, Deputy.)

[fol. 2564]

COURT'S EXHIBIT 31

SUBPOENA TO TESTIFY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA

—v.—

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Defendants.

To Howard Lonergan 9645 SW Ardenwald, Portland, Oregon.

You are hereby commanded to appear in the United States District Court for the District of OREGON at United States Courthouse in the city of Portland on the 29th day of April 1957 at 10:00 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the United States.

April 29, 1957.

R. DeMott,
Clerk.

By /s/ M. Casey,
Deputy Clerk.

RETURN

Received this subpoena at Portland, Oregon on 4-29-57 and on 4-29-57 at Portland, Oregon I served it on the within named Howard Lonergan by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.

/s/ Harold Sexton U. S. Marshal

By /s/ Martin Lavalle
Deputy

(Stamp—U. S. Marshal's Office, District of Oregon, Received Apr. 29, 1957, Harold Sexton, U. S. Marshal.)

(Stamp—U. S. District Court, District of Oregon, Filed: Apr. 30, 1957, R. DeMott, Clerk, By /s/ M. Spargo, Deputy.)

[fol. 2566]

Court's Exhibit 32
Marshal's Crim. No. 1982

Subpoena to Testify

United States District Court
For the District of Oregon

No. C-18321

United States of America

—v.—

James B. Elkins and Raymond F. Clark

To Vayne W. Gardiane, Oregon State Police, Milwaukie, Oregon

Claude Cross, Oregon State Police, Milwaukie, Oregon

You are hereby commanded to appear in the United States District Court for the District of Oregon at The United States Courthouse in the city of Portland on the 16th day of April, 1957 at 11 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the United States.

April 11, 1957.

R. DeMott,
Clerk.

By /s/ Thora Lund,
Deputy Clerk.

RETURN

Received this subpoena at Portland, Oregon on April 11, 1957 and on April 12, 1957 at Portland, Oregon I served it on the within named Vayne W. Gardane, Claude Cross by delivering a copy to them.

/s/ Harold Sexton

By /s/ Frank L. Meyer

(Stamp—U. S. District Court, District of Oregon, Filed: Apr. 15, 1957, R. DeMott, Clerk, By /s/ M. Spargo, Deputy.)

[fol. 2568]

Court's Exhibit 34
Marshal's Crim. No. 1982

Subpoena to Testify

United States District Court
For the District of Oregon

No. C-18321

United States of America

—v.—

James Butler Elkins and Raymond Frederick Clark,
Defendants.

To James C. Darby, Oregon State Police, Salem, Oregon

You are hereby commanded to appear in the United States District Court for the District of OREGON at United States Courthouse in the city of Portland, Ore. on the 1st day of May, 1957 at 10:15 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the United States.

May 1, 1957.

R. DeMott,
Clerk.

By /s/ M. CASEY,
Deputy Clerk.

RETURN

Received this subpoena at Portland, Oregon on 5-1-57 and on 5-1-57 at Portland, Ore. I served it on the within named James C. Darby at U S M office.

/s/ HAROLD SEXTON U. S. Marshal

By /s/ MARTIN LAVALLE
Deputy

(Stamp—U. S. Marshal's Office, District of Oregon, Received May 1, 1957, Harold Sexton, U. S. Marshal.)

(Stamp—U. S. District Court, District of Oregon, Filed: May 1, 1957, R. DeMott, Clerk, By /s/ M. SPARGO, Deputy.)

[fol. 2570]

COURT'S EXHIBIT 38
Marshal's Crim. No. 1982

SUBPOENA TO TESTIFY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. C-18321

UNITED STATES OF AMERICA

—v.—

JAMES B. ELKINS and RAYMOND F. CLARK

To William M. Langley, Multnomah County, District Attorney's Office, Multnomah County Courthouse, Portland, Oregon

Janice Langley, 2704 S. W. English Lane, Portland, Oregon

You are hereby commanded to appear in the United States District Court for the District of OREGON at The United States Courthouse in the city of Portland on the 17th day of April 1957 as ten o'clock A. M. to testify in the above entitled case.

This subpoena is issued on application of the United States.

April 11, 1957.

R. DeMott,
Clerk.

By /s/ THORA LUND,
Deputy Clerk.

RETURN

Received this subpoena at Portland, Oregon on April 12th, 1957 and on April 12th, 1957 at Portland, Oregon I served it on the within named William M. Langley and Janice Langley, both personally by delivering a copy to them.

HAROLD SEXTON
United States Marshal

By /s/ GEORGE VRANIZAN Deputy

(Stamp—U. S. District Court, District of Oregon, Filed: Apr. 15, 1957, R. DeMott, Clerk, By /s/ M. SPARGO, Deputy.)

[fol. 2572] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. Civ. 9175

UNITED STATES OF AMERICA, Plaintiff,

—v.—

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Defendants.

COMPLAINT FOR INJUNCTION—Filed May 23, 1957

Comes now the plaintiff, the United States of America, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, acting pursuant to direction of The Attorney General of the United States, and complains and alleges:

I.

That the defendants above-named, James Butler Elkins and Raymond Frederick Clark, were heretofore indicted during the month of February 1957, by a Grand Jury of the United States District Court for the District of Oregon, charged with violation of Title 47, Sections 501 and 605, United States Code, and Title 18, Section 371, United States Code, to which indictment, which is identified as Case Num-

ber C-18321 in the records of the Clerk of the United States District Court for the District of Oregon, defendants each entered a plea of not guilty to all counts and trial of said cause was, after respective pleas, calendared on the 20th day of March 1957, to commence on the 16th day of April 1957, and did commence on the 16th day of April 1957 by the commencement of the selection of a jury to try the said cause.

II.

That notwithstanding pendency of said proceedings in this Court, defendants herein did, as plaintiffs in a proceeding in the Circuit Court of the State of Oregon for Multnomah County, on April 13, 1957, seek to restrain and enjoin certain persons under subpoena and other persons who were contemplated would be subpoenaed or required to give testimony in connection with said proceedings in this court, from giving testimony in said trial in this above-[fol. 2573] entitled court on said indictment No. C-18321 and did take steps to obtain from and did obtain from the Circuit Court of the State of Oregon for Multnomah County, a temporary restraining order purporting to restrain the said certain witnesses from giving testimony in said cause pending in this court above-mentioned. The restraining order of April 15, 1957 which was thereafter continued on or about April 19, 1957 being in words and figures as follows:

"In the Circuit Court of the State of Oregon
For the County of Multnomah

No. 238-958

"James Butler Elkins and
Raymond Frederick Clark, Plaintiffs,

—vs.—

George Minielly, Terry Schrunk, Hal Lynn, Garth Stackhouse, Richard Sacanti, Arthur Heem, William M. Langley, Robert Y. Thornton, Vayne Gurdane, Claude Cross, F. O. Maison, Howard Lonergan, Oscar Howlitt, and other State of County officials unknown to plaintiffs, Defendants."

Temporary Restraining Order

Clerk's Note

Temporary Restraining Order (omitted in printing). The text of this order is set out in the Ninth Circuit Proceedings, Re Petition of Elkins & Clark, Etc., No. 15522, printed side folio 556, printed page 301.

[fol. 2574] III.

That the complaint of the said defendants herein, in the action in the Circuit Court of the State of Oregon for Multnomah County, is in words and in figures as follows:

[fol. 2575]

"In the Circuit Court of the State of Oregon
For the County of Multnomah

No. 238-958

"James Butler Elkins and Raymond Frederick Clark, Plaintiffs,

—vs.—

"George Minielly, Terry Schrunk, Hal Lynn, Garth Stackhouse, Richard Sacanti, Arthur Heem, William M. Langley, Robert Y. Thornton, Vayne Gurdane, Claude Cross, F. O. Maison, Howard Lonergan, Oscar Howlett, and other State or County officials unknown to plaintiffs, Defendants.

Complaint

"Comes now the plaintiffs and for cause of suit against the defendants and each of them, allege as follows:

"I.

"At all times herein mentioned, defendant Schrunk was the duly elected, qualified and acting sheriff of Multnomah County, Oregon, defendants Minielly, Lynn, Stackhouse, Sacanti, and Heem were and are now duly appointed, qualified and acting deputies sheriff of said county and state; defendant Langley was and now is the duly elected, qualified and acting District Attorney for the State of Oregon for Multnomah County, defendant Robert Y. Thornton was and now is the duly elected, qualified and acting Attorney General of the State of Oregon, defendant F. O. Maison was and now is the duly appointed, qualified and acting Superintent (sic) of the State Police of the State of Oregon and defendants Gurdane and Cross were and now are officers thereof and the other defendants were and now are state or county officials whose names are unknown

to plaintiffs but who may have participated in or acquired knowledge of a certain raid on plaintiff Clark's premises more fully described below; that although defendant Schrunk is not now Sheriff and although defendant Lonergan is not now Deputy District Attorney, the relief sought herein should be granted as against them as fully as against the other defendants.

"II.

"On or about May 17, 1956, defendants Schrunk, Minielly, Lynn, Stackhouse, Sacanti and Heem, acting under color of a certain purported search warrant issued by the Honorable John R. Mears, Judge of the District Court of the State of Oregon for the County of Multnomah, which warrant was based on a purported affidavit of the defendant William L. Langley, illegally entered the premises of plaintiff Clark, at 2409 S. E. Main Street, Portland, Multnomah County, Oregon, at approximately 10:00 o'clock P.M., and acting under the authority of said search warrant, and their authority as law enforcement officers, illegally searched the same and illegally seized, *inter alia*, certain electronic tape and wire recordings and a minifon wire recorder and illegally removed such property from said premises to the County Court House of Multnomah County and other places within the County and caused the same to be played or run through a machine which transformed the magnetic characteristics of said tapes into audible sound waves and speech and made tape and/or recorded copies and transcripts thereof.

[fol. 2576] "III.

"That May 18, 1956, the day following such illegal search and seizure, was Oregon's primary election day and, by virtue of the statutes of the State of Oregon, a nonjudicial day; Saturday, May 19, 1956 and Sunday, May 20, 1956, were likewise nonjudicial days in that the Multnomah County Court House in the City of Portland was closed for official business and the courts were not in session therein. On May 21, 1956, the first judi-

cial day following the seizure of said property, plaintiff Raymond Frederick Clark filed in the District Court of the State of Oregon before the Honorable John R. Mears, Judge, under the title of State ex rel Langley v. Clark, et al, No. C a motion to suppress said evidence, said matter being heard by said Judge John Mears on Monday, the 21st, Tuesday the 22nd and Wednesday the 23rd, of May, 1956, and on said last date the said Judge Mears entered his order declaring said search and seizure to be illegal, invalid and void, allowing said plaintiff's motion to suppress and directing that said tape and wire recordings and all copies thereof and said minifon be turned over to defendant Thornton; that defendant Thornton subsequently turned said tapes and wire recordings over to defendants Cross and Gurdane for safe-keeping.

"IV.

"On May 18, 1956, defendant Schrunk illegally permitted various third perties (sic) to make copies of said tape and wire recordings, and thereafter, on May 22, 1956, defendant William M. Langley caused said electronic tape and wire recordings or portions thereof, or transcripts of said tape and wire recordings, or of portions thereof, to be played before the Grand Jury of Multnomah County, Oregon; that thereafter on or about May 22, 1956, said Grand Jury returned a joint indictment against each of the respective plaintiffs as defendants, said indictment being Circuit Court Clerk's Registry No. C-34157, in this Honorable Court; plaintiffs pray that this Court take judicial notice of the entire files in such proceedings in this Court and in District Court; plaintiffs, however, reserve the right to produce evidence of each of such proceedings, and of the Orders of Court therein.

"V.

"That these plaintiffs as defendants in No. C-34157, after arraignment, filed a timely motion to suppress the evidence seized under said purported search war-

rant; that subsequent to the filing of said motion and prior to the decision thereof, a purported search warrant issued from the United States District Court for the District of Oregon by the United States Commissioner thereof, and, under said purported search warrant, the said electronic tape and wire recordings and said minifon, were seized from the custody of the courts of the State of Oregon and of the defendants Gurdane, Cross and Thornton, by agents of the Federal Bureau of Investigation of the United States Department of Justice.

"VI.

"Thereafter and on or about the 17th day of September, 1956, the plaintiffs' motion to suppress was heard by the Honorable Frank J. Lonergan, and, acting as Judge of the Circuit Court, said Judge Lonergan declared said search and seizure of May 17, 1956, illegal and allowed said motion to suppress and directing that said tape and wire recordings and said minifon be held by defendant Robert Y. Thornton as Attorney General of the State of Oregon, until further order of Court.

[fol. 2577]

"VII.

"That following said seizure of said items by agents of the Federal Bureau of Investigation, and on or about the 4th day of February, 1957, the plaintiffs were jointly indicted as defendants by a Grand Jury of the United States of America for the District of Oregon upon an indictment bearing United States District Court Clerk's Registry No. C-18321, which said indictment is entitled "Indictment for Violation of Section 371, Title 18 USC and Sections 501 and 605, Title 47 USC" and bears nine counts and alleges in one count a conspiracy between plaintiffs herein to violate said sections, and alleges in eight other counts substantive violations of said sections 501 and 605, Title 47 USC.

"VIII.

"Thereafter, plaintiffs herein filed in United States District Court as defendants in C-18321 a motion to suppress said evidence, consisting of said tape and wire recordings, and said minifon; said Court has heard evidence thereon extending from April 9, 1957 to April 12, 1957, and on April 12, 1957, the United States District Court for the District of Oregon, by and through Honorable William G. East, Judge, made and entered an order denying plaintiffs' motion to suppress such evidence, (on the ground that any illegality of the search of May 17, 1956, would not affect the process of the federal court in that the federal court's search and seizure did not occur on said premises but was executed in Milwaukie, Oregon, at the office of the The First State Bank of Milwaukie).

"IX.

"That ever since May 17, 1956, and at various times unknown to plaintiffs, defendants, and other officers of the sheriff's office, district attorney's office, and state police, whose names are unknown to plaintiffs, played portions of said tape and wire recordings for agents of the Federal Bureau of Investigation, urged a federal prosecution of these plaintiffs as defendants under the provisions of Section 47 U.S.C.A., Section 501 and Section 605, (the Federal Communications Act), communicated with the United States District Attorney and his assistants for the District of Oregon, and with agents of the Federal Bureau of Investigation, and other federal officers to these plaintiffs unknown, advised said federal authorities in general of the existence and location of and provided information concerning the contents of said tape and wire recordings, and urged that the matter be presented to the federal grand jury for indictment and prosecution; that in so acting, defendants did so in their official capacities with respect to the said items seized in said illegal seizure of May 17, 1956, and did so knowing that said seizure had been adjudged illegal, invalid and void by said respective state courts.

"X.

"That the trial of these plaintiffs as defendants on said federal indictments has been set in the United States District Court for the District of Oregon before the Honorable William G. East to commence on April 16, 1957, at 10:00 o'clock A.M. and subpoenas have been issued therein to some of these defendants.

"XI.

"That the Constitution of the State of Oregon (Article I, Section 9) provides that no laws shall violate the right of people to be secure against unreasonable search and seizure and no warrant shall issue but on probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized, and the statutes of the [fol. 2578] State of Oregon enacted pursuant to and in enforcement of said Article I, Section 9, (particularly ORS Ch. 141) regulate the issuance of search warrants and provide for a hearing when the grounds for issuance of a search warrant are controverted; that ORS 141.160 provides that if it appears that the property taken was not the same as described in the warrant or that there was no probable cause for believing that the grounds on which the warrant was issued existed, the magistrate hearing such matter shall cause the property to be restored to the person from whom it was taken, or, if such property be contraband, said property should be destroyed; that said statutes indicate and establish policy of the State of Oregon for the enforcement of the Constitutional Rights of all persons, including these plaintiffs.

"XII.

"That defendants, and other state and county officials unknown to the plaintiffs, in acting as described in Paragraph IX above, have attempted to and have sought to circumvent the provisions of Article I, Section 9 of the Oregon Constitution, and the statutes enacted pursuant thereto and the policy established there-

by, and have attempted to and have thereby deprived plaintiffs of their aforementioned constitutional rights, and have thereby attempted and have circumvented and flouted the orders of this Court and of the District Court of Multnomah County, and attempted to and have violated their duties as public officials and law enforcement officers of providing to these plaintiffs that protection against unreasonable searches and seizures guaranteed by said constitutional provisions; that defendants, and other state and county officials unknown to these plaintiffs, intend to make themselves available for the giving of testimony, and/or intend to respond to subpoenas for the giving of testimony as witnesses in the trial of said federal indictments concerning the events of and surrounding illegal search and seizure of May 17, 1956, as described above, and concerning the items seized in said illegal search, particularly said wire and tape recordings and said minifon wire recorder; that defendants and other state and county officials unknown to these plaintiffs in so making themselves available and in so responding to subpoenas for testimony as witnesses aforesaid intend to and if permitted to so testify will thereby deprive these plaintiffs of their rights as guaranteed by the constitutional provisions as aforesaid, and will thereby circumvent and flout the orders of this Court and the District Court as aforesaid and will thereby circumvent and flout the established policy of the State of Oregon by depriving these plaintiffs of the aforesaid constitutional rights, and will thereby irreparably harm these plaintiffs in their enjoyment of the rights guaranteed by the Oregon Constitution, by the statutes enacted pursuant thereto and by the policy of the protection embodied therein.

"XIII.

"Plaintiffs have no plain, speedy or adequate remedy at law, and unless defendants and each of them, are restrained as requested herein, the giving of testimony as aforesaid by defendants, and other state and county

officers unknown, will completely and wholly destroy the constitutional rights of plaintiffs mentioned above.

"WHEREFORE plaintiffs pray that this Court issue a temporary restraining Order, enjoining and restraining defendants, and each of them, from testifying in the United States District Court for the District of Oregon or in any other court in any trial upon United States Court Indictment No. C-18321 or any other indictment which may be returned against plaintiffs as defendants, with respect to any of the matters surrounding and concerning said illegal search and seizure of May 17, 1956, and with respect to any of the items illegally seized in said illegal search, particularly said [fol. 2579] tape and wire recordings and said mihifon wire recorder; and for the further Order of this Court requiring the defendants and each of them to appear in this Court at the hour of ..... o'clock, ... M., on the ..... day of April, 1957, then and there to show cause, if any there be, why a temporary injunction enjoining said defendants and each of them as aforesaid should not issue; and after trial a permanent injunction therefore issue and for such other and further relief as to this Court may seem equitable and just.

s/ BURTON J. FALLGREN
s/ WILLIAM J. CRAWFORD
Attorneys for Plaintiff Raymond Frederick Clark

s/ WALTER H. EVANS, JR.
Attorney for Plaintiff—James Butler Elkins

"STATE OF OREGON)
) ss
County of Multnomah)

"I, RAYMOND FREDERICK CLARK, being first duly sworn, say that I am one of the plaintiffs in the within entitled suit and that the foregoing complaint is true as I verily believe.

RAYMOND FREDERICK CLARK

"Subscribed and sworn to before me this 13th day of April, 1957.

BURTON J. FALLGREN
Notary Public for Oregon
My Commission Expires: 9-21-57"

IV.

That thereafter of the persons named as defendants in said action in the Circuit Court of the State of Oregon for Multnomah County, the following persons were subpoenaed on behalf of the plaintiff, the United States of America, by the Clerk of the United States District Court for the District of Oregon, to give testimony in said cause at various times during the course of said trial, which trial began on April 16, 1957 and was concluded on May 11, 1957:

George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan.

That each of said witnesses was advised by the above-entitled court that said state court restraining order was as to the proceedings then before the above-entitled court of no effect and that failure to answer relevant questions put to him in said cause would subject him to being in [fol. 2580] contempt of the United States Distr. Court for the District of Oregon.

That being so advised each of said witnesses above-named did then and there answer questions put to them by the plaintiff and defendants pursuant to said subpoenas and direction of said court.

V.

That thereafter on the 10th day of May 1957, on the Motion of defendants herein as relators, said defendants herein did obtain from said Circuit Court of the State of Oregon, Multnomah County, as relators, an Order to Show Cause, directing the said witnesses to show cause on May 24, 1957 at 10:00 A.M. or as soon thereafter as the matter

may be heard, why said witnesses should not be held in contempt of said court for giving of such testimony, which Order to Show Cause was based on a Motion by the relators and supported by Affidavit of their attorney, which Motion and Affidavit are in words and figures as follows:

"IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

"STATE OF OREGON, ex rel JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,

Relators,

vs.

"GEORGE MINIELLY, TERRY SCHRUNK, HAL LYNN, GARTH STACKHOUSE, RICHARD SACANTI, ARTHUR HEEM, WILLIAM M. LANGLEY, ROBERT Y. THORTON, VAYNE GURDANE, CLAUDE CROSS, H. G. MAISON, HOWARD LONERGAN, OSCAR HOWLETT, and other State and County officials unknown to plaintiffs,

Defendants.

MOTION FOR ORDER TO SHOW CAUSE

"Come now the relators, by and through Walter H. Evans, Jr., one of their attorneys, and respectfully move this Court for an order requiring the hereinafter named defendants to appear before this Court at a time and place certain to then and there show cause, if any there be, why they and each of them should not be held in contempt of this Court by reason of the violation by them and each of them of the temporary restraining order heretofore entered herein on or about the 15th day of April, 1957, all as set forth in more detail in the affidavit of Walter H. Evans, Jr., attached hereto and by reference made a part hereof.

"Relators request an order to show cause addressed to the defendants, George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan.

[fol. 2581] "The foregoing motion is based on the affidavit of Walter H. Evans, Jr., attached hereto and upon the provisions of ORS 33.010, et seq., and the record and file herein.

"WALTER H. EVANS, JR.
Of Attorneys for Relators

"I hereby certify that the within Motion for Order to Show Cause and attached affidavit is interposed in good faith and not for the purpose of delay, and is, in my opinion, well founded in law.

"WALTER H. EVANS, JR.
Of Attorneys for Relators"

"STATE OF OREGON,)
) ss
County of Multnomah,)

"I, WALTER H. EVANS, JR., being first duly sworn, depose and say that I am one of the attorneys for the relators herein and that I make this affidavit in support of a motion for an order to show cause requiring certain of the defendants hereinafter named to appear and show cause, if any there be, why they and each of them should not be held in contempt for violation of the temporary restraining order and temporary injunction heretofore entered herein.

"That I am also the attorney for the plaintiff James Butler Elkins in a certain criminal proceeding pending in the United States District Court for the District of Oregon, to-wit: No. C-18321, in which the United States of America is the plaintiff and the relators herein are defendants, which trial commenced on or about the 16th day of April, 1957, and is still continuing but in which both sides have rested their case and no further evidence is to be adduced therein.

"That on or about the 26th-27th day of April, 1957, George Minielly, one of the defendants herein, appeared at the trial of the above United States District Court criminal proceedings, which proceedings are hereinafter referred to as the "criminal trial", was

sworn, took the witness stand, and after having advised the Court that he was aware of and familiar with the provisions of the restraining order and temporary injunction heretofore entered herein and after having had a copy thereof exhibited to him proceeded to violate the provisions of said restraining order by then and there giving testimony in said criminal trial in open court and by responding to questions put to him by the United States of America by and through its District Attorney or Assistant District Attorney, which said questions related to and were directly concerned with that certain alleged search warrant and the alleged search and seizure carried out thereunder on or about May 17, 1956, on the premises of the relator Raymond Frederick Clark at 2409 S. E. Main Street, Portland, Oregon, and further specifically responded to questions similarly put to him by the attorney for plaintiff in said criminal trial relating to items seized by certain of the defendants or held by defendants on or about May 17, 1956, or thereafter and particularly five reels of magnetic tape recordings and the reels upon which said magnetic tape recordings were wound, the boxes in which they were contained and certain slips of paper found in said boxes, all in direct violation of the restraining order heretofore entered herein and with full knowledge of the existence and issuance thereof.

"That the defendant Terry Schrunk on or about the 27th & 29th day of April, 1957, did likewise respond to and answer questions concerning said search and [fol. 2582] seizure and said objects allegedly seized therein in response to questions put to him by one of the attorneys for the United States in said criminal proceedings, all in direct violation of the restraining order heretofore entered herein and with full knowledge of the existence and issuance thereof.

"That defendant William M. Langley on the 1st-3rd day of May, 1957, defendant Vayne Gurdane on the 1st day of May, 1957, defendant Claude Cross on the 30th day of April and 1st day of May, 1957, and de-

fendant Oscar Howlett on the 30th day of April, 1957, did each give testimony regarding said tape recordings, said boxes and slips in response to questions put to them by one of the attorneys for the United States in said criminal proceedings, each having theretofore been advised of the existence of said restraining order and being bound by the terms thereof.

"That Howard Lonergan is a member of the Oregon State Bar and an officer of this Court and was originally a defendant in this suit but said suit was dismissed as to him upon his representation in oral court that he had not been subpoenaed as a witness, did not expect to be, and upon his further representation that he would advise the Court if he were subpoenaed, thereafter the said Howard Lonergan was subpoenaed, was called as a witness, and prior thereto was advised of the existence of said restraining order and the same was exhibited to him and notwithstanding his knowledge of said order, did then and there violate the same by disregarding it and giving testimony in response to questions put to him by the attorneys for the United States relating to said tape recordings, reels, boxes and slips of paper, all in direct violation of said temporary restraining order and with full knowledge thereof.

"That in each instance the defendant above named was specifically instructed by the Honorable William G. East to answer the questions over the objection of the relators herein, under penalty of contempt.

"That in each of the foregoing circumstances, the violation of said restraining order was deliberate and not inadvertent, and each of the defendants herein knew that irreparable harm would result to these plaintiffs and each of them by virtue of the testimony given by each of the defendants herein and each of them and each of said defendants has thereby deliberately and knowingly violated a lawful order of this Court.

"That a copy of said restraining order is attached hereto and that said restraining order was continued by order of this Court made in open court on or about

the 19th day of April, 1957, as a temporary injunction and during all times mentioned herein has remained in full force and effect and continues herein.

"That I make this affidavit in support of a motion for an order to show cause why defendants should not be adjudged in contempt.

"Walter H. Evans, Jr.

"Subscribed and sworn to before me this 10th day of May, 1957.

"(NOTARIAL SEAL)

"Gertrude Gray
"Notary Public for Oregon
"My Commission expires May 7, 1958"

[fol. 2583]

VI.

That the proceeding under which the defendants were charged by indictment in the United States District Court for the District of Oregon was and is exclusively a matter within the jurisdiction of the above-entitled United States District Court pursuant to the statutes of the United States.

VII.

That the power to subpoena witnesses and compel testimony in such cases is provided by Federal law and is necessary to the exercise of the jurisdiction of the Federal Court and in aid thereof.

VIII.

That unless restrained and enjoined therefrom, the said relators, the defendants herein, will prosecute and offer evidence in said Order to Show Cause in the Circuit Court of the State of Oregon for Multnomah County, against the aforesaid witnesses, all of which will subject said witnesses to exposure to penalty as for contempt for having testified under the process of this court, with the purpose and effect of harassing and intimidating said witnesses as a result of their giving testimony in a matter in which plaintiff

submits they were required to give testimony under the laws of the United States and under the Supreme law of the land.

IX.

That such action of the relators would result in the irreparable harm to the United States, its courts and litigants therein, and particularly in Case No. C-18231, United States District Court for the District of Oregon.

X.

That the interest of the United States in its power to compel testimony is by such action in danger of irreparable subversion and there can be no more fundamental subversion of the function of a court than the frustration of its power to compel testimony, and the relators, defendants herein, have sought and are seeking to subvert such power of the court by the intimidation of witnesses with the ultimate aim of obstructing justice thereby, by preventing the production of evidence ruled by this court to be admissible under the rules of this court and the laws applicable thereto.

[fol. 2584]

XI.

That plaintiff has no plain, speedy and adequate remedy at law in the premises.

XII.

That jurisdiction hereof is based on Title 28, Section 1651, United States Code.

WHEREFORE, plaintiff prays:

1. That the defendants herein, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them be restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain Order to Show Cause entered on May 10, 1957 by the Circuit Court of the State of Oregon for Multnomah County, directing the aforesaid

witnesses to appear and show cause why they should not be held in contempt of said Circuit Court of the State of Oregon for Multnomah County as the result of giving their testimony in the above-entitled federal court cause No. C-18321, United States District Court for the District of Oregon.

2. That because said Order to Show Cause has been fixed for hearing in the Circuit Court of the State of Oregon for Multnomah County for 10:00 A.M. on May 24, 1957, unless a temporary restraining order is forthwith issued, irreparable damage may result to the plaintiff before notice can be served upon the defendants and a hearing had thereon, plaintiff prays for a temporary restraining order, restraining and enjoining the defendants, their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, from giving testimony or prosecuting in any manner whatsoever in the said Order to Show Cause of May 10, 1957.

3. That the defendants be required to show cause why they, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, should not be required to take affirmative action to dismiss said proceedings in which they are the relators [fol. 2585] in the Circuit Court of the State of Oregon for Multnomah County, and refrain from any further proceedings, having as a stated purpose the punishment of the aforesaid witnesses as for their having testified in the United States District Court for the District of Oregon under the order and direction of the above-entitled court acting under color of the judicial office of the United States of America.

/s/ C. E. LUCKEY
C. E. Luckey
United States Attorney
for the District of Oregon

[fol. 2586]

STATE OF OREGON)
) ss.
County of Multnomah)

I, C. E. Luckey, being first duly sworn, depose and say that I am the United States Attorney for the District of Oregon, and acting on behalf of the plaintiff, United States of America, pursuant to the direction of the Attorney General of the United States; and further depose and say that the facts stated in the complaint herein are true as I verily believe.

/s/ C. E. LUCKEY

Subscribed and sworn to before me
this 22nd day of May, 1957.

/s/ V. E. HARR
V. E. Harr, Notary Public
For the State of Oregon
My Commission Expires: 2/18/61

(SEAL)

[fol. 2587]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. Civ. 9175

UNITED STATES OF AMERICA, Plaintiff,

—v.—

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Defendants.

TEMPORARY RESTRAINING ORDER—Filed May 23, 1957

THIS MATTER having come on before the above-entitled Court, based upon the verified complaint of the plaintiff herein and the motion of the plaintiff, appearing by and

through C. E. Luckey, United States Attorney for the District of Oregon, acting pursuant to direction of The Attorney General of the United States; and the plaintiff having moved the Court for a temporary restraining order without notice, praying that the defendants, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, be restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain Order to Show Cause entered on May 10, 1957 by the Circuit Court of the State of Oregon for Multnomah County directing that George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan show cause, on May 24, 1957 at the hour of 10:00 AM or as soon thereafter as the same might be heard, why they should not be held in contempt of said Circuit Court of the State of Oregon for Multnomah County as a result of giving their testimony in the United States District Court for the District of Oregon, cause No. C-18321; and it appearing to the Court that the plaintiff has alleged that:

* * * * * * *

Clerk's Note:

The text of paragraphs I, II, and III of this Temporary Restraining Order is identical with paragraphs I, II, and III of the Complaint for Injunction, printed side folio 2572, printed page 422.

[fol. 2594] IV.

That thereafter of the persons named as defendants in said action in the Circuit Court of the State of Oregon for Multnomah County, the following persons were subpoenaed on behalf of the plaintiff, the United States of America, by the Clerk of the United States District Court for the District of Oregon, to give testimony in said cause at various times during the course of said trial, which trial began on April 16, 1957 and was concluded on May 11, 1957:

George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan.

[fol. 2595] That each of said witnesses was advised by the above-entitled court that said state court restraining order was as to the proceedings then before the above-entitled court of no effect and that failure to answer relevant questions put to him in said cause would subject him to being in contempt of the United States District Court for the District of Oregon.

That being so advised each of said witnesses above-named did then and there answer questions put to them by the plaintiff and defendants pursuant to said subpoenas and direction of said court.

Clerk's Note:

The text of paragraph V of this Temporary Restraining Order is identical with paragraph V of the Complaint for Injunction, printed side folio 2572, printed page 422.

[fol. 2598] VI.

That the proceeding under which the defendants were charged by indictment in the United States District Court for the District of Oregon was and is exclusively a matter within the jurisdiction of the above-entitled United States District Court pursuant to the statutes of the United States.

VII.

That the power to subpoena witnesses and compel testimony in such cases is provided by Federal law and is necessary to the exercise of the jurisdiction of the Federal Court and in aid thereof.

VIII.

That unless restrained and enjoined therefrom, the said relators, the defendants herein, will prosecute and offer evidence in said Order to Show Cause in the Circuit Court of the State of Oregon for Multnomah County, against the aforesaid witnesses, all of which will subject said witnesses to exposure to penalty as for contempt for having testified under the process of this court, with the purpose and effect of harassing and intimidating said witnesses as a result of their giving testimony in a matter in which

plaintiff submits they were required to give testimony under the laws of the United States and under the Supreme law of the land.

IX.

That such action of the relators would result in the irreparable harm to the United States, its courts and litigants therein, and particularly in Case No. C-18231, United States District Court for the District of Oregon.

X.

That the interest of the United States in its power to compel testimony is by such action in danger of irreparable subversion and there can be no more fundamental subversion of the function of a court than the frustration of its power to compel testimony, and the relators, defendants herein, have sought and are seeking to subvert such power of the court by the intimidation of witnesses with the ultimate aim of obstructing justice thereby, by preventing the production of evidence ruled by this court to be admissible under the rules of this court and the laws applicable thereto.

[fol. 2599]

XI.

That plaintiff has no plain, speedy and adequate remedy at law in the premises.

XII.

That jurisdiction hereof is based on Title 28, Section 1651, United States Code.

And it further appearing to the Court that said verified complaint further alleges and prays that because said Order to Show Cause has been fixed for hearing in the Circuit Court of the State of Oregon for Multnomah County for 10:00 A.M. on May 24, 1957, unless a temporary restraining order is forthwith issued, irreparable damage may result to the plaintiff before notice can be served; and it appearing to the Court that on the allegations of the complaint, a temporary restraining order should be issued; now, therefore, it is hereby

ORDERED:

1. That the defendants herein, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, be and are restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain proceeding in which George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan are ordered to show cause, in which the defendants, James Butler Elkins and Raymond Frederick Clark are relators and George Minielly and others are defendants, in which said cause the aforesaid witnesses are directed to appear and show cause why they should not be held in contempt of the said Circuit Court of the State of Oregon for Multnomah County as a result of giving their testimony in Case No. C-18321 in the United States District Court for the District of Oregon.

2. That this temporary restraining order shall remain in full force and effect for ten (10) days from the date hereof.

ISSUED THIS 23rd day of May
1957 at 10:15 o'clock A.M.

WILLIAM G. EAST
United States District Judge

[fol. 2600]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 9175

UNITED STATES OF AMERICA, Plaintiff,

—vs.—

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Defendants.

ORDER EXTENDING TEMPORARY RESTRAINING ORDER—
May 31, 1957

This matter coming on to be heard upon the motion of the United States of America, plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, pursuant to the direction of the Attorney General of the United States, and it appearing to the Court that good cause exists therefor,

IT IS HEREBY ORDERED that the Temporary Restraining Order heretofore entered in the above-entitled cause on the 23rd day of May, 1957, is extended for an additional period of ten days from the time from which the original Temporary Restraining Order granted herein would expire.

ISSUED THIS 31st day of May,
1957, at 10:30 o'clock A. M.

WILLIAM G. EAST
United States District Judge

[fol. 2601]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 9175

UNITED STATES OF AMERICA, Plaintiff,

—vs.—

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Defendants.

ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION
SHOULD NOT ISSUE—May 31, 1957

Upon the records and files and the verified Complaint of the plaintiff in this action, and good cause appearing therefor,

IT IS HEREBY ORDERED that the above named defendants, and their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, shall show cause before the above-entitled Court in the United States Courthouse at Portland, Oregon, on the 10th day of June, 1957, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, why a preliminary injunction restraining the said defendants and their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, from giving testimony or prosecuting in any manner whatsoever that certain Order to Show Cause entered on May 10, 1957, in the Circuit Court of the State of Oregon for Multnomah County, in which case James Butler Elkins and Raymond Frederick Clark are relators against George Minielly, and others, as defendants, and in which case said defendants are ordered to show cause why they should not be held in contempt of said Court by reason of their having given testimony in Case No. C-18321 in the United States District Court for the District of Oregon, should not issue.

IT IS FURTHER ORDERED that a copy of this Order be served upon the above named defendants as soon as service may reasonably be effected, and at least four days before the time fixed herein for showing cause.

Dated this 31st day of May, 1957.

WILLIAM G. EAST
United States District Judge

[fol. 2604]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DOCKET ENTRIES

DATE		
1957		
May	23	Filed Complaint for Injunction
"	23	" Plaintiff's Motion for Temporary Restraining Order
"	23	Filed and Entered Temporary Restraining Order E
"	24	Filed Summons—with Marshal's returns
"	31	Filed Plaintiff's Motion for extension of Temporary Restraining Order
"	31	Filed Notice of Extension of Temporary Restraining Order
"	31	Filed Plaintiff's Motion for Preliminary Injunction
"	31	Filed Notice of Motion for Preliminary Injunction
"	31	Filed and Entered Order for Extension of Temporary Restraining Order E
"	31	Filed and Entered Order to show cause why Preliminary Injunction should not issue—Hearing set for June 10, 1957, at 10:00 a. m. E
June	10	Entered Order continuing temporary restraining Order until October, 7, 1957, or, until further application is made by either party prior thereto E
"	10	Filed Answer

[fol. 2605] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2606]

PROCEEDINGS IN U.S.C.A. FOR THE NINTH CIRCUIT

[fol. 2610]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,738

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Appellants,

—vs.—

UNITED STATES OF AMERICA, Appellee.
Appeals from the United States District Court
for the District of Oregon.

OPINION—April 27, 1959

Before Mathews, Chambers and Hamlin, Circuit Judges.

MATHEWS, Circuit Judge:

On February 4, 1957, in the United States District Court for the District of Oregon, appellants (James Butler and Raymond Frederick Clark), hereafter called defendants, were indicted in nine counts. On February 18, 1957, defendants were arraigned, pleaded not guilty and were granted permission "to move against the indictment" on or before March 18, 1957.[1] Defendants did not so move on or before March 18, 1957.

On March 19, 1957, defendants filed a motion improperly entitled "Motion to dismiss the indictment."[2] On March 29, 1957, defendants filed a motion improperly entitled "Supplemental motion to dismiss the indictment."[3] The motion

[1] See Rule 12(b)(3) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

[2] Actually, the motion of March 19, 1957, was not a motion to dismiss the indictment, but was a motion (1) to dismiss counts 2-9 of the indictment and (2) for a bill of particulars if counts 2-9 were not dismissed.

[3] Actually, the motion of March 29, 1957, was the first and only motion of defendants to dismiss the indictment.

[fol. 2611] of March 19, 1957, was denied on April 2, 1957. The motion of March 29, 1957, was denied on April 12, 1957.

On March 25, 1957, defendants filed a motion improperly entitled "Motion for return of seized property and suppression of evidence."[4] That motion was denied on April 12, 1957.

On March 12, 1957, the case was set for trial on March 26, 1957. On March 18, 1957, defendants filed a motion for continuance, thereby seeking postponement of the trial to a date at least 90 days after March 26, 1957—in other words, to June 24, 1957, or later. On March 20, 1957, the District Court ordered the trial postponed to April 16, 1957, thus granting in part and denying in part the motion of March 18, 1957. On April 13, 1957, each defendant filed a motion for continuance, thereby seeking postponement of the trial to a date at least 30 day after April 16, 1957—in other words, to May 16, 1957, or later. The motions of April 13, 1957, were denied on April 15, 1957.

Defendants had a jury trial beginning on April 16, 1957, and ending on May 11, 1957. On May 9, 1957, at the close of the evidence offered by the Government, defendants moved for judgments of acquittal. Thereafter, on May 9, 1957, counts 3 and 4 of the indictment were dismissed, and the motions for judgments of acquittal were denied. No evidence was offered by either defendant. However, on May 10, 1957, the motions for judgments of acquittal were renewed and again denied. Thereafter the case was argued, the jury was charged, and on May 11, 1957, a verdict was rendered finding defendants guilty on counts 1, 2 and 5-9 of the indictment.

On May 15, 1957, the time for filing a motion for a new trial and a motion in arrest of judgment was extended to May 21, 1957.[5] On May 16, 1957, defendants renewed their

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[4] Actually, the motion of March 25, 1957, was not a motion for return of seized property and suppression of evidence, but was a motion for an order directing that certain property be suppressed as evidence against defendants. No return of property was sought.

[5] See Rules 33 and 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

[fol. 2612] motions for judgments of acquittals.[6] On May 21, 1957, defendants filed a motion for a new trial and a motion in arrest of judgment. On May 24, 1957, two judgments of conviction were entered—one against Elkins and one against Clark.

The judgment against Elkins sentenced him on count 1 to be imprisoned for a period of ten months and to pay a fine of $1,000; on count 2 to be imprisoned for a period of ten months and to pay a fine of $1,000; on each of counts 5-9 to be imprisoned for a period of six months; the two periods of ten months each to run consecutively; the five periods of six months each to run concurrently with each other and with the second period of ten months. Thus Elkins was sentenced to be imprisoned for a total period of twenty months and to pay fines totaling $2,000.

The judgment against Clark sentenced him on count 1 to be imprisoned for a period of four months and to pay a fine of $250; on count 2 to be imprisoned for a period of sixty days and to pay a fine of $250; on each of counts 5-9 to be imprisoned for a period of sixty days; the period of four months and the first mentioned period of sixty days to run consecutively; the five remaining periods of sixty days each to run concurrently with each other and with the first mentioned period of sixty days. Thus Clark was sentenced to be imprisoned for a total period of four months and sixty days and to pay fines totalling $500.

On June 17, 1957, the District Court entered an order denying the motions for judgments of acquittal, the motion for a new trial and the motion in arrest of judgment. On June 18, 1957, the District Court entered supplemental judgments, supplementing the judgments of May 24, 1957, by adding to and including in each of them an award of costs to the Government. These appeals are from the judgments of May 24, 1957, and the supplemental judgments of June 18, 1957.[7]

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[6] See Rule 29(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

[7] Defendants obtained many extensions of the time for filing the record and docketing the appeals. Consequently, the record was not filed, nor were the appeals docketed, until May 28, 1958. Defendants' brief was not filed until October 31, 1958.

[fol. 2613] Defendants' brief contains 15 specifications of error.[8] These will be considered in such order as may seem to us convenient.

Specification 14 says that the District Court erred "in failing to allow specification VI of defendants' motion to dismiss the indictment." The only motion of defendants to dismiss the indictment was the motion of March 29, 1957.[9] There was no "specification VI" of that motion.

Specification 14 also says that the District Court erred "in failing to allow defendants' motion in arrest of judgment," meaning, we suppose, that the District Court erred in denying the motion in arrest of judgment.

The stated ground of the motion in arrest of judgment was, in substance, that each count of the indictment failed to charge an offense against the United States. As indicated above, counts 3 and 4 of the indictment were dismissed at the close of the evidence offered by the Government. Furthermore, as indicated above, the sentences on counts 5-9 of the indictment added nothing to the sentences on counts 1 and 2. Hence, in so far as the motion in arrest of judgment related to counts 3-9, its denial—right or wrong—did not prejudice defendants. Hence we are not required to decide whether counts 3-9 charged offenses

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[8] Our Rule 18 (formerly Rule 20) provides:

"1. Counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief • • •

"2. This brief shall contain • • • .

"(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. • • • "

[9] The denial of the motion of March 29, 1957, is not specified as error.

against the United States.[10] There remain for consideration counts 1 and 2.

[fol. 2614] Count 1 alleged: "That from on or about the 1st day of August, 1955, and continuously thereafter up to and including the month of July, 1956, in the District of Oregon, [defendants] did unlawfully, willfully and knowingly conspire, combine, confederate and agree together and with each other and with diverse other persons whose names are to the Grand Jury unknown, to commit certain offenses against the United States of America, to-wit: to intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications, in violation of [47 U.S.C.A. §§ 501 and 605]; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. • • • "

Count 1 further alleged that it was a part of the conspiracy that certain acts would be done by defendants. These acts were described in four paragraphs of count 1 numbered 2 to 5, inclusive. Count 1 further alleged that, to effect the object of the conspiracy, eight overt acts were done—six by Elkins, one by Clark and one by both defendants. These acts were described in eight paragraphs of count 1 numbered (1) to (8), inclusive.

Thus count 1 charged an offense against the United States, namely, a violation of 18 U.S.C.A. § 371.[11]

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[10] Lawn v. United States, 353 U.S. 339; Haid v. United States, 9 Cir., 157 F. 2d 631; Jaynes v. United States, 9 Cir., 224 F. 2d 367; Toliver v. United States, 9 Cir., 224 F. 2d 743; Paquet v. United States, 9 Cir., 236 F. 2d 203; Simpson v. United States, 9 Cir., 241 F. 2d 222; Chin Bick Wah v. United States, 9 Cir., 245 F. 2d 274; Donaldson v. United States, 9 Cir., 248 F. 2d 364; Robinson v. United States, 9 Cir., 262 F. 2d 647; Stein v. United States, 9 Cir., 263 F. 2d 579.

[11] Section 371 provides:

"If two or more persons conspire • • • to commit any offense against the United States, • • • and any one or more of such persons do any act to effect the object of the con-

Count 2 alleged: "That [defendants], on or about August 23, 1955, in the District of Oregon, did knowingly, willfully and unlawfully, without authority of the senders [fol. 2615] thereof, intercept the record or cause to be intercepted and recorded, wire communications between William M. Langley and Thomas E. Maloney, and divulge or cause to be divulged the existence of such intercepted communications to others, to-wit: William M. Langley, Clyde C. Crosby and others whose names are to this Grand Jury unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America." Thus count 2 charged an offense against the United States, namely, a violation of 47 U.S.C.A. §§ 501[12] and 605.

The relevant provision of §605—the provision on which count 2 was based—is that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." As used in this provision, the term "any communication" includes intrastate communications.[13] Defendants therefore contend that this provision is unconstitutional. There is no merit in this contention.[14]

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spiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

[12] Section 501 provides: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter [47 U.S.C.A. §§ 151-609] prohibited or declared to be unlawful, * * * shall, upon conviction thereof, be punished for such offense * * * by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; * * *"

[13] Weiss v. United States, 308 U.S. 321; United States v. Sugden, 9 Cir., 226 F. 2d 281; United States v. White, 7 Cir., 228 F. 2d 833; Massengale v. United States, 6 Cir., 240 F. 2d 781; Lipinski v. United States, 10 Cir., 251 F. 2d 53.

[14] Weiss v. United States, supra; Massengale v. United States, supra; Lipinski v. United States, supra.

Specification 1 says that the District Court erred "in denying defendants' motion to dismiss (or in the alternative) a motion to require the Government to furnish a bill of particulars in certain instances," meaning, we suppose, that the District Court erred in denying the motion of March 19, 1957—the motion which sought (1) dismissal of counts 2-9 of the indictment and (2) a bill of particulars if counts 2-9 were not dismissed.

The stated ground of that part of the motion of March 19, 1957, which sought dismissal of counts 2-9 was, in sub-[fol. 2616] stance, that counts 2-9 failed to charge offenses against the United States. We have shown that count 2 charged such an offense, and that no decision is necessary as to whether counts 3-9 charged such offenses.

That part of the motion of March 19, 1957, which sought a bill of particulars was addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[15] The record shows no abuse of that discretion.

Specification 2 says that the District Court erred in denying "the motion to suppress," meaning, obviously, the motion of March 25, 1957, reading as follows: "Come now [defendants], by and through their attorneys, and move [the District Court] for its order directing that certain property of which defendants herein are [on March 25, 1957] the owners, a schedule of which is annexed hereto and made a part hereof,[16] * * * be suppressed as evidence against these defendants and each of them in this and any other criminal proceedings against them, or each of them." No other motion to suppress was made or filed in this case.

In support of the motion of March 25, 1957, an affidavit of William J. Crawford, one of defendants' attorneys, was

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[15] Wong Tai v. United States, 273 U.S. 77; West v. United States, 9 Cir., 12 F. 2d 776; Cummings v. United States, 9 Cir., 15 F. 2d 168; Rubio v. United States, 9 Cir., 22 F. 2d 766; Fiddelke v. United States, 9 Cir., 47 F. 2d 751; Sutton v. United States, 9 Cir., 79 F. 2d 863; Shreve v. United States, 9 Cir., 103 F. 2d 796; Maxfield v. United States, 9 Cir., 152 F. 2d 593; Himmelfarb v. United States, 9 Cir., 175 F. 2d 924; Remmer v. United States, 9 Cir., 205 F. 2d 277.

[16] The annexed schedule listed the following property: Five electronic tape recordings, one Minifon recording machine and three spools of Minifon recording wire.

filed by defendants on March 26, 1957. The District Court heard the motion on April 9-12, 1957. At that hearing, defendants adduced the testimony of 16 witnesses, but defendants themselves did not, nor did either of them, testify at that hearing or at all.

The stated ground of the motion of March 25, 1957, was, in substance, that the property mentioned therein was unlawfully searched for and seized by officers of the State of Oregon on May 17, 1956, and by Federal officers on September 5, 1956.

[fol. 2617] The record shows that the property mentioned in the motion of March 25, 1957, was searched for and seized at Portland, Oregon, on May 17, 1956, by officers of the State of Oregon. However, the motion did not say, nor does the record show, that any Federal officer participated in the State search and seizure—the search and seizure made on May 17, 1956. Instead, the record shows that there was no such participation. Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized.[17] Hence the question of the lawfulness of the State search and seizure need not be considered.

The record shows that the property mentioned in the motion of March 25, 1957, was searched for and seized at Milwaukie, Oregon, on September 5, 1956, by Ronald E. Sherk, an agent of the Federal Bureau of Investigation, under a search warrant issued on September 5, 1956, by Claire Mundorff, a United States commissioner within the District of Oregon, on an affidavit made and sworn to by Agent Sherk before Commissioner Mundorff on September 5, 1956. There was no other search for or seizure of the property by any Federal officer or officers.

The record shows that the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§ 3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

Subdivision (e) of Rule 41 provides: "A person aggrieved by an unlawful search and seizure may move the

[17] Burdeau v. McDowell, 256 U.S. 465; Hall v. United States, 9 Cir., 48 F. 2d 66; Symons v. United States, 9 Cir., 178 F. 2d 615; Parker v. United States, 9 Cir., 183 F. 2d 268; Andersen v. United States, 9 Cir., 237 F. 2d 118; Rios v. United States, 9 Cir., 256 F. 2d 173.

district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence [fol. 2618] of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *"

As indicated above, the motion of March 25, 1957, did not seek return of the property mentioned therein, but merely sought suppression of the property as evidence against defendants; nor was the motion based on any of the five grounds specified in subdivision (e) of Rule 41.

The motion did not say, nor does the record show, that the Federal search and seizure were made at any house or place owned, occupied or used by defendants or either of them. Instead, the record shows that the Federal search and seizure were made at the First State Bank of Milwaukie, Oregon. The motion did not say, nor does the record show, that, at the time of the Federal search and seizure—September 5, 1956—defendants or either of them owned or had any proprietary interest in the property seized,[18] or that the property was at that time in the custody or possession of defendants or either of them. Instead, the record shows that the property was not in the custody or possession of defendants or either of them at any time after May 17, 1956.

Hence, so far as the record shows, defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized.[19] Hence we are not required to consider defendants' con-

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[18] As indicated above, the motion contained a statement to the effect that the property seized was, on March 25, 1957, the property of defendants. That, however, was immaterial, if true; for, as indicated above, the Federal search and seizure were made on September 5, 1956.

[19] Patterson v. United States, 9 Cir., 31 F. 2d 737; Kwong How v. United States, 9 Cir., 71 F. 2d 71; Whitcombe v. United States, 3 Cir., 90 F. 2d 290; Creech v. United States, 5 Cir., 97 F. 2d 390; Wilson v. United States, 10 Cir., 218 F. 2d 755; United States v.

tention that the Federal search and seizure were unlawful. However, we have considered it and find no merit in it.

Specification 3 says, in effect, that the District Court erred (1) in denying in part the motion for continuance [fol. 2619] filed on March 18, 1957, and (2) in denying the motion for continuance filed on April 13, 1957. These motions were addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[20] The record shows no abuse of that discretion.

Specification 12 and a part of specification 13 relate to the admission of evidence at the trial,[21] but do not, as required by our Rule 18,[22] quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 and the part of specification 13 which relates to the admission of evidence.[23] However, we have considered them and find no merit in them.

Specifications 4, 5, 6, 11 and 15 and a part of specification 13 relate to the District Court's charge to the jury, but do not, as required by our Rule 18, set out the instructions referred to[24] totidem verbis, together with the grounds of the objections urged at the trial. Hence we are

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Ponder, 4 Cir., 238 F. 2d 825; Accardo v. United States, D.C.Cir., 247 F. 2d 568; United States v. Pepe, 2 Cir., 247 F. 2d 838.

[20] Crono v. United States, 9 Cir., 59 F. 2d 339; Kramer v. United States, 9 Cir., 168 F. 2d 515; Williams v. United States, 9 Cir., 203 F. 2d 85; Hutson v. United States, 9 Cir., 238 F. 2d 167; Sherman v. United States, 9 Cir., 241 F. 2d 329.

[21] The evidence referred to in specification 12 was the testimony of eight witnesses—George Minielly, Terry D. Schrunk, Oscar D. Howlett, Howard R. Lonergan, Claude F. Cross, Vayne M. Gurdane, James C. Darby and William M. Langley. The evidence referred to in specification 13 consisted of exhibits.

[22] See footnote 8.

[23] Ziegler v. United States, 9 Cir., 174 F. 2d 439; Mosca v. United States, 9 Cir., 174 F. 2d 448; DuVerney v. United States, 9 Cir., 181 F. 2d 853; Lii v. United States, 9 Cir., 198 F. 2d 109; Cly v. United States, 9 Cir., 201 F. 2d 806; Gordon v. United States, 9 Cir., 202 F. 2d 596; Lee v. United States, 9 Cir., 238 F. 2d 341.

[24] Specifications 4, 11 and 15 refer to instructions given. Specifications 5, 6 and 13 refer to instructions refused. The instructions

not required to consider specifications 4, 5, 6, 11 and 15 and the part of specification 13 which relates to the [fol. 2620] charge.[25] However, we have considered them and find no merit in them.

Specifications 7, 8 and 9 say, in effect, that the District Court erred in denying the motions for judgments of acquittal—the motions made and denied on May 9, 1957, renewed and denied on May 10, 1957, renewed on May 16, 1957, and denied on June 17, 1957. The stated ground of these motions was, in substance, that the evidence was insufficient to sustain a conviction of either defendant on any count of the indictment. The evidence was amply sufficient to sustain a conviction of each defendant on counts 1 and 2. Since counts 3 and 4 were dismissed at the close of the evidence offered by the Government, and since the sentences on counts 5-9 added nothing to the sentences on counts 1 and 2, we are not required to decide whether the evidence was sufficient to sustain a conviction of defendants or either of them on counts 3-9 or any of them.[26]

Specification 10 says, in effect, that the District Court erred in denying the motion for a new trial. That motion was addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[27] The record shows no abuse of that discretion.

Judgments affirmed.

[File endorsement omitted]

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referred to in specifications 4, 5, 6, 11 and 13 were on the subject of interception. The instructions referred to in specification 15 submitted a form of verdict to the jury and told the jury how to use it.

[25] Zeigler v. United States, supra; Mosca v. United States, supra; DuVerney v. United States, supra; Lii v. United States, supra; Cly v. United States, supra; Gordon v. United States, supra.

[26] See cases cited in footnote 10.

[27] Gage v. United States, 9 Cir., 167 F. 2d 122; Eagleston v. United States, 9 Cir., 172 F. 2d 194; Grover v. United States, 9 Cir., 183 F. 2d 650; Adams v. United States, 9 Cir., 191 F. 2d 206; Balestreri v. United States, 9 Cir., 224 F. 2d 915; Steiner v. United States, 9 Cir., 229 F. 2d 745; Bloch v. United States, 9 Cir., 238 F. 2d 631; Pool v. United States, 9 Cir., 260 F. 2d 57; Pitts v. United States, 9 Cir., ... F. 2d .....; Straight v. United States, 9 Cir., —— F. 2d ——.

[fol. 2622]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,738.

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Appellants,

—vs.—

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—April 27, 1959

Appeals from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and each of them hereby is affirmed.

(Endorsed) Judgment

[File endorsement omitted]

[fol. 2623]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before Mathews, Chambers and Hamlin, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING, ETC.—May 28, 1959

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellants, filed May 27, 1959, and within time allowed therefor by rule of court, for

a rehearing of the above-entitled cause be, and hereby is denied.

It Is Further Ordered that the suggestion of Appellants for a rehearing, en banc, be, and hereby is denied.

[fol. 2624] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2625]

SUPREME COURT OF THE UNITED STATES

No. 126—October Term, 1959

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, Petitioners,

—vs.—

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is set for argument immediately preceding No. 52.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 126

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 27, 1959.

OPINIONS BELOW

Ninth Circuit. The opinion of the court below in this case (Appendix A, *infra*, pp. A1-A13) has not yet been reported.

The opinion of the court below denying petitioners' application for a stay to enable the filing of a petition for a writ of prohibition (Appendix C, *infra*, pp. A15-A17) was not reported.

The opinion of the court below denying the petitioner Clark leave to appeal *in forma pauperis* is reported at 250 F. 2d 145.

District Court. The oral opinion of the district court denying petitioners' motion to suppress (2 MS 519-531)[1] is set forth in Appendix D, *infra*, pp. A18-A26; it was not reported.

State Courts. The opinion of the Circuit Court of the State of Oregon for Multnomah County, rendered in connection with the injunction forbidding state and county officials from testifying in the United States District Court in the present case is set out in Appendix E, *infra*, pp. A27-A34; it was not reported.

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[1] The record in the present case consists of exhibits plus 20 typewritten volumes, as follows:

The first volume contains pleadings, motions, and docket entries; it will be referred to simply as "R.," followed by page references.

Two volumes contain the pre-trial proceedings on the motion to suppress and the motion to dismiss; they will be referred to as "MS."

One volume contains the proceedings on the motion for a continuance; it is not involved here, but was referred to below as "MC."

Fifteen volumes contain testimony; they will be referred to as "Tr.," suitably identified by volume and page.

The twentieth volume contains the proceedings in the court below.

There has also been filed the separately certified record of petitioners' application for a stay to enable the filing of a writ of prohibition.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A14) was entered on April 27, 1959. A timely petition for rehearing was denied on May 28, 1959, the day after its filing (Appendix B, *infra*, pp. A14-A15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, after a state court has suppressed evidence that it held to be illegally seized as a matter of state law and has enjoined state and county officials from testifying concerning such evidence, a federal conviction may thereafter be had and affirmed, where the federal court did not undertake any independent examination of the original state seizure but assumed that it was illegal as a matter of state law, and proceeded on the basis of (a) the testimony of the state officers, who were directed by the federal court to testify notwithstanding the state court injunction, and of (b) the suppressed evidence, which was subsequently taken from the constructive custody of the state court under a federal search warrant, on the footing that *Rea* v. *United States*, 350 U. S. 214, involves an application of the Supremacy Clause, rather than a doctrine of reciprocity and of comity between state and federal courts.

2. Whether the evidence used against petitioners in the federal prosecution was obtained in violation of their rights under the Constitution of the United States.

3. Whether, if the evidence was unlawfully obtained, it was admissible in the federal prosecution of petitioners because obtained by state officers without federal participation.

4. Whether, where a motion to suppress evidence under Criminal Rule 41(e) is based on the ground, *inter alia*, of the insufficiency of the affidavit on which the federal

search warrant was issued, and the district court denies the motion on the expressed ground that the validity of that warrant is immaterial, and then cuts off proof as to whether the affidavit made a sufficient showing of probable cause, it is open to the court of appeals to affirm the ruling denying the motion on the ground that the federal search warrant was valid.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE OF COURT INVOLVED

The constitutional provisions, statutes, and rule of court involved are set forth below (Appendix G, *infra*, pp. A39-A43).

STATEMENT

Since the issues presented in this petition concern only questions relating to search and seizure, there are stated only sufficient facts to place those issues in their setting. And in view of the interrelationship between state and federal proceedings that this case involves, the relevant facts will be adduced in chronological order.

A. The Original State Proceedings

Petitioner Elkins, who is, admittedly, the employer of the petitioner Clark, made certain disclosures to a Portland, Oregon, newspaper that cast serious doubt on the integrity and faithfulness of the District Attorney for Multnomah County, Oregon, in which the City of Portland is located. Thereafter, late in the afternoon of Thursday, May 17, 1956, the District Attorney in question, one William M. Langley (8 Tr. 1389), executed an affidavit (R. 59-60) for a search warrant directed against the home of the petitioner Clark, alleging the presence there (R. 59) of "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to Exhibit said photographs."

The warrant (Def. Ex. 5, 4 Tr. 591-593) was executed that Thursday night (1 MS 92-94, 100) by the then Sheriff,

one Terry D. Schrunk (1 MS 86),[2] and among the many articles seized, none of them of an obscene or indecent nature (1 MS 97), were five reels of tape recordings in boxes, with which were slips allegedly in the handwriting of the petitioner Clark.[3]

The State courts were closed on the next three days, Friday, Saturday, and Sunday, May 18-20, 1956.[4] On Monday morning, May 21, 1956, petitioners filed, in the State District Court that had issued the search warrant, a motion to suppress evidence and to return or destroy the seized goods (R. 61). After hearing testimony, the State District Court (Mears, J.) granted the motion to suppress, on the ground that the District Attorney's affidavit had not shown probable cause. The order granting the motion, dated May 29, 1956, appears at R. 61-65; it directed that the property now in question (R. 65) "be and the same is hereby ordered impounded in the possession of the Sheriff of Multnomah County, to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard."

Pursuant to this order, the five reels of tape recordings were placed in a safe deposit box in the First State Bank of Milwaukie, Oregon (7 Tr. 1196, 1203; 8 Tr. 1212-1215, 1244-1246).

Prior to the ruling, however, and during the pendency of the motion to suppress, the Grand Jury of Multnomah County, Oregon, on May 22, 1956, indicted petitioners for

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[2] Schrunk was Mayor of Portland when he testified, and was then under two state court indictments (1 MS 86).

[3] The five reels became Govt. Ex. 1-5, inclusive, in this case, while the slips became Govt. Ex. 1-B, 2-B to 2-G inclusive, 3-B, 4-B and 5-B; see *infra*, p. 11.

[4] Friday, May 18, 1956, was primary election day in Oregon. O.R.S. 249.340. It was in consequence both a legal (O.R.S. 187.020(3)) as well as a judicial (O.R.S. 1.060) holiday.

the offense of intercepting and obtaining telecommunications (R. 53-54, 67-69), in violation of Ch. 675 of the Laws of Oregon, 1955 (now O.R.S. 165.535).[5]

The District Attorney challenged the jurisdiction of the State District Court to order suppression of the evidence once an indictment had been returned (see 7 Tr. 1168-1169, 1175-1176, 1184-1187; 8 Tr. 1296-1297), whereupon the matter was reargued before the State Circuit Court, a court of general criminal jurisdiction (see *In re Application of Loundagin*, 129 Ore. 652, 278 Pac. 950, and authorities there cited). That court, on September 17, 1956, granted the motion to suppress, and directed that the material found and seized at the time of the state search be turned over to the Attorney General of Oregon to be used and disposed of only on order of the Court; the ruling of the State Circuit Court (Lonergan, P. J.) appears at R. 66-70.

B. The Federal Prosecution

In the meantime, while the tapes in question were in the bank in Milwaukie pursuant to the order of the State District Court, and while petitioners' renewed motion to suppress was under advisement in the State Circuit Court, the tapes were taken from the Milwaukie Bank under a federal search warrant issued by the United States Commissioner upon affidavit of F.B.I. Agent R. E. Sherk (R. 6-9).

The present nine count indictment followed, on February 4, 1957 (R. 10-21).

Count I (R. 10-14) charged a conspiracy (18 U.S.C. § 371) "to intercept wire communications and divulge and publish the existence, contents, substance, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communica-

[5] Following their federal trial, and during the pendency of their appeal to the Ninth Circuit, the state indictment against petitioners was dismissed.

tions," in violation of 47 U.S.C. §§ 501 and 605 (*infra*, pp. A40-A42).

Counts II to IX, inclusive, alleged substantive violations of 47 U.S.C. §§ 501 and 605, each count naming different persons as parties to the allegedly intercepted conversations, and different persons to whom the conversations were allegedly disclosed (R. 15-21).

Thereafter, petitioners moved to suppress evidence, specifying among other items, 5 electronic tape recordings (R. 50)[6] "of which defendants herein are the owners" (R. 46). The motion to suppress set forth five grounds (R. 46-49; see also 1 MS 210-212):

First, that the state search warrant under which the property was originally seized by state officers had been held illegal by the Oregon courts, and that accordingly such property could not be used in the present proceeding.

Second, the federal search warrant was illegal and void "in that it is and was based upon an insufficient affidavit," so that there was not probable cause for its issuance.

Third, the illegality of the original state seizure renders the evidence illegal "regardless of the manner in which the Federal authorities later obtained the same."

Fourth, that the state and county officers made the unlawful search and seizure "solely for the purpose of permitting and encouraging a prosecution in the Federal Courts for the commission of a crime against the United States."

Fifth, that the property seized was in the custody of the Oregon State Courts at the time, and that the United States District Court had no jurisdiction to seize it.

The foregoing motion to suppress was supported by an affidavit and numerous exhibits (R. 52-70) that specified

[6] These were later introduced as Government Exhibits 1 to 5 inclusive; see p. 11, *infra*.

in detail the state and federal proceedings already outlined in the foregoing portions of the Statement.

Four days of hearing on this motion followed, on April 9 to 12, 1957 (1 MS 40-298, 2 MS 303-517). During the course of the hearing, the United States Attorney conceded the illegality of the original seizure for purposes of the federal motion (1 MS 84):

> "MR. LUCKEY: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal."

Immediately after the close of the four day hearing, the trial judge (East, D. J.) delivered an oral opinion denying the motion (2 MS 519-531); see Appendix D, *infra*, pp. A18-A26. In the course of his opinion, the judge said (2 MS 520),

> "The Court will make no finding as to whether or not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal on its face."[7]

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[7] Judge East had earlier expressed the same view (2 MS 321-323):

> "THE COURT: • • • I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal it has to be on some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.
>
> • • • • • • • • • • •
>
> "I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not. His right of possession must

The substance of the ruling denying petitioners' motion to suppress, insofar as now pertinent, was that the illegality of the original state seizure as a matter of state law did not vitiate and taint the evidence forevermore (*infra*, pp. A18-A26).

C. State Court Injunction Against State Officers

Judge East announced the foregoing ruling on April 12, 1957. On the next day, petitioners brought suit in the Circuit Court of the State of Oregon for Multnomah County, seeking a temporary restraining order to forbid the State District Attorney, the Sheriff of Multnomah County and his deputies, named State Policemen, and "other State or County officials unknown to plaintiffs," from testifying concerning any facts learned in or as a result of the original state search and seizure which two Oregon courts had successively held to be illegal (*supra*, pp. 5-6). Following a hearing, the State Circuit Court issued the restraining order as prayed for (text at 1 Tr. 3-4), and wrote an opinion (Appendix E, *infra*, pp. A27-A34); as the text thereof shows, the court (Redding, J.) relied on the doctrine of *Rea* v. *United States*, 350 U. S. 214. The restraining order then issued has remained in effect ever since.

D. Application to Ninth Circuit for Writ of Prohibition

When, at the commencement of the federal trial, on April 16, the restraining order just mentioned was shown

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be based upon some other ground than that of a valid search warrant in his possession. • • •

"MR. CRAWFORD [counsel for petitioners on the motion] • • • I was trying to understand the effect of your Honor's ruling and what it would prevent me from attempting to do.

"THE COURT: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant."

to the United States District Judge, the latter stated (1 Tr. 5) that "I have reached this firm conclusion that the order just read so far as it attempts to interfere with the process of this Court here before issue is void and is a nullity and of no force and effect."

Accordingly, petitioners applied to the United States Court of Appeals for the Ninth Circuit for a three day stay of the pending trial, to enable them to petition for a writ of prohibition to forbid the United States District Judge from compelling the giving of testimony or the production of evidence by the officials of the County of Multnomah and of the State of Oregon named in the State Circuit Court injunction. This application was presented on April 22, 1957, the trial being suspended on that day; see 1 Tr. 204-210, 230-231; 2 Tr. 233.

The Ninth Circuit denied the application for a stay, on the basis that a writ of prohibition might not be issued, essentially because the Court of Appeals was of the view that the doctrine of *Rea* v. *United States*, 350 U. S. 214, was not one of comity. The Ninth Circuit said that petitioners' "right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence." The *Per Curiam* opinion is set forth in Appendix C, *infra*, pp. A15-A17; it has never been reported, perhaps because, although an opinion in form, it was captioned "Undocketed order."

E. Petitioners' Trial in United States District Court

As has been indicated, petitioners' trial began on April 16, and it continued, except for the adjournment on April 22 to permit the foregoing application to be presented to the Ninth Circuit, for some four weeks, including Saturday and night sessions.

1. Inasmuch as nothing now turns on the validity of the indictment or the sufficiency (as distinguished from

the legality) of the evidence, it is only necessary to note two items:

First, the five reels of tape recordings which petitioners had sought to have suppressed (R. 46-49, 50) were admitted into evidence over their objections (Govt. Ex. 1, 1 Tr. 101, 194; Govt. Ex. 2, 1 Tr. 113, 227; Govt. Ex. 3, 1 Tr. 120, 249-250; Govt. Ex. 4, 1 Tr. 122, 270; Govt. Ex. 5, 1 Tr. 134, 279; see also, as to all, 12 Tr. 1937).[8]

Second, eight officers of the State of Oregon and of its subdivision Multnomah County, seven of whom had been enjoined by the State Circuit Court, by name, from testifying concerning, *inter alia*, copies or transcripts of the tape recordings illegally seized by state officers on May 17, 1956, and thereafter ordered suppressed by two courts of the State of Oregon, were, notwithstanding the state restraining order, directed by the United States District Judge to testify, over petitioners' objections:

(1) George Minielly, Deputy Sheriff of Multnomah County (4 Tr. 569-570, 573-576, 577).

(2) Terry D. Schrunk, Sheriff of Multnomah County at the time of the illegal seizure (5 Tr. 799-804, 6 Tr. 808).

(3) Oscar D. Howlett, Deputy District Attorney of Multnomah County (7 Tr. 1089-1094).

(4) Howard R. Lonergan, Deputy District Attorney of Multnomah County (7 Tr. 1152-1159).

(5) Claude F. Cross, Lieutenant of the Oregon State Police (7 Tr. 1195, 1198-1199, 1202).

(6) Vayne M. Gurdane, Captain of the Oregon State Police (8 Tr. 1241-1244).

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[8] Each reel was also accompanied by a package, slips, and the like, which were given sub-numbers; these were likewise admitted; see, in addition to the references cited in the text, 6 Tr. 826. Certain of the slips were photographically enlarged, given exhibit numbers suffixed by Z, and similarly admitted over objection. 7 Tr. 1044-1045, 1052.

(7) William M. Langley, District Attorney of Multnomah County (8 Tr. 1389-1391).

(8) James C. Darby, sergeant of the Oregon State Police (8 Tr. 1265). This witness recognized that he was under the State restraining order, because, although not specifically named therein, he was within the category of "other State and County officials" (8 Tr. 1266). He was similarly directed to testify by the trial judge on the basis of the invalidity of the state order (8 Tr. 1266-1268).

All of these witnesses then testified at length, and although, as indicated above, the sufficiency of the evidence on the counts that went to the jury is not now in issue, petitioners do not understand that it could be or that it is now contended that there would be any case against them if their motion to suppress the five reels of tape recordings had been granted, or if the United States District Judge had not directed the eight officials of the State of Oregon and of Multnomah County to testify in violation of the restraining order issued by the Circuit Court of the State of Oregon for the County of Multnomah.

2. At the close of the prosecution's case, the trial judge dismissed Counts III and IV of the indictment and overt acts 1 and 2 of Count I (R. 105; 15 Tr. 2468). In all other respects, petitioners' motions for acquittal were denied (R. 105, 106).

The remaining counts were submitted to the jury, which on May 11, 1957, found both petitioners guilty on all of them (R. 107-108) after deliberating for three hours and 20 minutes (R. 109).

Motions for a new trial and in arrest of judgment, filed by both petitioners, were denied (R. 110-126, 139). The motion for a new trial urged that the tape recordings, Govt. Ex. 1-5, should have been excluded (¶ VIII, R. 114-115), and that the state officers enjoined by the Oregon

State Courts from testifying should not have been directed to testify (¶ IX, R. 115; ¶ XV, R. 116-117).

3. Petitioner Elkins was sentenced to be imprisoned for ten months and to pay a fine of $1000 on Count I; to be imprisoned for ten months and to pay a fine of $1000 on Count II; to be imprisoned for six months on each of Counts V to IX; the periods of ten months each to run consecutively; the periods of six months each to run concurrently with each other and with the second period of ten months (R. 127-128). Hence, petitioner Elkins' sentence was twenty months' confinement and a total fine of $2000.

Petitioner Clark was sentenced to be imprisoned for four months and to pay a fine of $250 on Count I; to be imprisoned for 60 days and to pay a fine of $250 on Count II; to be imprisoned for 60 days on each of Counts V to IX; the period of four months and the first period of 60 days to run consecutively; the remaining periods of 60 days each to run concurrently with each other and with the first period of 60 days (R. 129-130). Hence, petitioner's Clark's sentence was nearly six months' confinement (four months plus 60 days) and a total fine of $500.

By supplemental judgments, each petitioner was made liable for the Government's taxable costs (R. 140-141).

Each petitioner filed timely notices of appeal as to each judgment (R. 131-138, 142).

F. State Contempt Proceedings After Conclusion of Federal Trial; the Federal Injunction

Following the close of the evidence, both petitioners moved in the Oregon Circuit Court for Multnomah County for an order adjudging in contempt the seven state officials who by testifying at the federal trial had violated the state court's restraining order in which they were specifi-

cally named. This motion was made returnable on May 24. The United States countered by seeking and obtaining *ex parte* from the United States District Court on May 23 a temporary restraining order forbidding petitioners from proceeding further with the contempt proceedings. Both the complaint of the United States and the findings in the temporary restraining order state that the federal subpoenas were issued subsequent to the state order prohibiting the seven named witnesses from testifying. The operative portions of this federal restraining order are set forth in Appendix F, *infra*, pp. A34-A39.

By its terms, the foregoing order was in force for 10 days. On May 31, it was extended for an additional 10 days, and petitioners were directed to show cause why a preliminary injunction should not issue. On June 10, the temporary restraining order was continued "until October 7, 1957, or, until further application is made by either party prior thereto."[9]

The foregoing proceedings were not a part of the record before the Ninth Circuit whose judgment is now sought to be reviewed. We have lodged with the Clerk a certified copy thereof (and have furnished a similar copy to the Solicitor General), in order that this Court may have before it all of the material pertinent to the resolution of the first question presented by this petition.

G. The Decision of the Court Below

On appeal, the Ninth Circuit affirmed. Apart from rulings on questions not here in issue, and numerous comments on alleged procedural irregularities on the part of petitioners and their trial counsel, the grounds of decision here material may be summarized as follows:

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[9] Inasmuch as the order as extended has long since expired by its terms, it is unnecessary now to consider whether such second extension was not authorized by Rule 65(b), F. R. Civ. P.; see *Sims* v. *Greene*, 160 F. 2d 512, 516 (C.A. 3); 7 Moore's *Federal Practice* (2d ed. 1955), ¶ 65.07, pp. 1648-1649.

1. The court below held that the lawfulness of the State search and seizure need not be considered, because the record failed to show Federal participation therein. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized," citing *inter alia* its decision in *Rios* v. *United States*, 256 F. 2d 173 (C.A. 9), in which certiorari had been granted the week before, 359 U. S. 965 (now No. 854, this Term). See pp. A8-A9, *infra*.

2. The court below considered and rejected petitioners' contention that the federal search and seizure was unlawful, holding that the federal search warrant had been issued in full conformity with federal law. See pp. A9-A11, *infra*.[10]

3. The court below held that there was no merit in petitioners' Specification 12, which challenged the District Court's compelling the testimony of the witnesses enjoined by the Oregon State court. See p. A12, *infra*.[11]

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[10] In view of such consideration, there is no need to dwell on the grounds on which the court below had earlier said that petitioners had no standing to challenge the federal search and seizure; see note 16, *infra*, p. 24, where those grounds are briefly discussed.

[11] As set forth in petitioners' brief in the C.A. 9, p. 114, this read:

> "Specification of Error No. 12. The Court below erred in compelling Government witnesses Minielly, Schrunk, Howlett, Lonergan, Gross, Gurdane, Darby and Langley to testify in violation of the terms of the State court restraining order."

The Ninth Circuit noted (*infra*, p. A12) that this specification did not, "as required by our Rule 18 [quoted in pertinent part in footnote 8 of the opinion, *infra*, p. A4] quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 and the part of specification 13 which relates to the admission of evidence. However, we have considered them and find no merit in them."

Inasmuch as Specification 12 clearly stated the grounds of petitioners' objection, which went to all of the evidence of the named

A timely petition for rehearing was denied on the day after it was filed (Appendix B, *infra*, pp. A14-A15).

REASONS FOR GRANTING THE WRIT

Here, as in *Rios* v. *United States*, 256 F. 2d 173 (C.A. 9), certiorari granted, 359 U. S. 965 (No. 854, this Term), there is squarely raised the question whether evidence unlawfully obtained by state officers without federal participation is admissible in a federal prosecution. The Ninth Circuit answered that question in the affirmative in both cases, in *Rios* on the assumption that the illegality of the state seizure had been established (256 F. 2d at 177), here on the view that such illegality was immaterial (*infra*, p. A9). Meanwhile, however, the District of Columbia Circuit in *Hanna* v. *United States*, 260 F. 2d 723, concluded that evidence illegally obtained by state officers was inadmissible in a federal prosecution even where there had not been the slightest federal participation in the original seizure, and disapproved its earlier ruling to the contrary in *Shelton* v. *United States*, 169 F. 2d 665 (D. C. Cir.), certiorari denied, 335 U. S. 834.

Inasmuch as this Court has agreed to review *Rios* while the Government did not seek certiorari in *Hanna*, the present case similarly warrants review, as it raises the *Rios* question, but with two strengthening variations.

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witnesses on substantive grounds that in no sense involved the rules of evidence (cf. Rule 26, F. R. Crim. P.), literal enforcement of the Ninth Circuit's Rule 18 in those circumstances would have required petitioners to duplicate in their brief some 800 pages of testimony adduced over objections that were clearly expressed and understandingly overruled by the trial judge on numerous occasions. Since, however, the court below did pass on and reject Specification 12, it is not necessary now to inquire whether such literal enforcement would have been improper because in violation of Rule 2, F. R. Crim. P., promulgated by this Court; that Rule requires the Criminal Rules "to provide for the just determination of every criminal proceeding," and directs that they be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

First, this case does not involve the complication of whether and to what extent the federal court was free to reexamine the state court's earlier determination of illegality; here the Government conceded the illegality of the original state seizure for purposes of this case (1 MS 84, quoted *supra*, p. 8), and such illegality was thereafter assumed by both courts below.

Second, as the Government itself has recognized, this case is a far stronger one for petitioners because of the presence of the state restraining order. In opposing certiorari in *Rios*, the Solicitor General said (Br. Op., No. 40 Misc. [now No. 854], this Term, p. 10):

> "Petitioner argues that, since this Court in *Rea* v. *United States*, 350 U. S. 214, held that, as a consequence to granting a motion to suppress, a federal court has authority to prevent federal officers from turning over evidence to the state and testifying in a state court, state officers should not be permitted to turn over evidence or testify in a federal court following the granting of a state motion to suppress. The short answer to this contention is that the State of California in this case has not attempted to restrain its officers from turning over evidence to the federal government or from testifying in a federal court. Whether it could do so, in view of the federal supremacy clause, is therefore not an issue presented by this case. * * *"

Here, however, that issue is squarely raised. We submit that its public importance is obvious, and that it was wrongly decided below.

First. *Rea* v. *United States*, 350 U. S. 214, held that, where evidence had been suppressed by a United States District Court under Rule 41(e), F. R. Crim. P. (*infra*, p. A43), because seized under an invalid federal search warrant, after which petitioner was charged in a state court on the basis of the suppressed evidence, he was entitled to an order from the United States District Court

enjoining the federal agent who had seized the evidence from transferring it to the state authorities, and from testifying with respect thereto in the state courts.

The present case raises the precisely converse situation: Evidence was suppressed by Oregon courts because seized under an invalid state search warrant. Petitioners were thereafter indicted in the federal court on the basis of the identical suppressed evidence. They obtained an order from the Oregon court forbidding the state and county[12] officials who had seized the property from testifying with respect thereto in the federal court or elsewhere. The federal court then compelled the state and county officials to testify, notwithstanding the state court's restraining order, in reliance on the Supremacy Clause.

That reliance, we submit, was misplaced. The Supremacy Clause comes into play when there is conflict between federal and state law and policy; in every instance of such a conflict, state law and policy must of course yield. E.g., *Testa* v. *Katt*, 330 U. S. 386; *Ableman* v. *Booth*, 21 How. 506. But, absent any conflict between federal and state laws and policies, the problem becomes one of maintaining state harmony consistently with national supremacy, "of preventing interference, friction, and conflict between the federal and state courts." Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930). As that scholarly discussion shows, the Supremacy Clause in no sense requires automatic precedence for the proceedings of federal courts in every instance.

Thus, as a state court cannot assume jurisdiction over property in the custody of a federal court (e.g., *Freeman*

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[12] Under Oregon law, counties are not independent governmental units, but are merely territorial subdivisions and political agents of the State. See *State ex rel.* v. *Malheur County Court*, 185 Ore. 392, 203 P. 2d 305; *Mackenzie* v. *Douglas County*, 81 Ore. 442, 159 Pac. 625, 1033; *Yamhill County* v. *Foster*, 53 Ore. 124, 99 Pac. 286.

v. *Howe*, 24 How. 450), so, reciprocally, a federal court may not seize property held under order of a state court. E.g., *Fischer* v. *American Ins. Co.*, 314 U. S. 549; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77. The latter rule was, plainly enough, violated here, for when the United States Commissioner, who is an arm of the court (see 28 U.S.C. § 631; 18 U.S.C. § 3041; *Todd* v. *United States*, 158 U. S. 278) issued the federal search warrant (R. 7-9) pursuant to which the five reels were seized, those reels were at the time in the custody of the state courts (R. 65, 67, 70). Even in criminal cases, the doctrine of comity requires that "each system shall be effective and unhindered in its vindication of its laws." *Ponzi* v. *Fessenden*, 258 U. S. 254, 259.

Considerations of comity likewise underlie the statute that since 1793 has denied federal courts the right to stay proceedings in state courts. Section 5 of the Act of March 2, 1793, c. 22, 1 Stat. 334, now 28 U.S.C. § 2283; see *Toucey* v. *New York L. I. Co.*, 314 U. S. 118. True, a federal court can grant a stay to protect federal property, *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, but here the seized articles were never thought to belong to the United States, and indeed petitioners were asserting a personal property interest therein (R. 46; 1 MS 286-287).[13] Yet neither the terms of 28 U.S.C. § 2283 or of

[13] Petitioners' motion to suppress, in this case, was (R. 46) for an "Order directing that certain property *of which the defendants herein are the owners*, a schedule of which is annexed," etc. [Emphasis supplied.] And, at the hearing on the motion to suppress, petitioners' counsel again specifically asserted a proprietary interest in the tapes (1 MS 286-287):

> "THE COURT: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?
> "MR. CRAWFORD: That's right.
> "THE COURT: Taken under the State's warrant. You don't repudiate that, do you?
> "MR. CRAWFORD: No.
> "THE COURT: Yes."

its predecessors, nor the underlying policy of those provisions, barred the federal court in *Rea* v. *United States*, 350 U. S. 214, from enjoining a federal agent from transferring property to state officials or from testifying in a state court.

The order considered in *Rea* did not operate as a stay, nor did it attempt to reach property in state custody; it involved simply an *in personam* restraint by a court of the United States on an officer of the United States. So here; the state restraining order (1 Tr. 3-4) was patterned after *Rea* and was directed against the testimony of state officials in order to redress effectively a violation of state law. That order did not undertake to deal with property in federal custody, nor did it attempt to prevent state officials from complying with prior lawful orders of a federal court (as in *Riggs* v. *Johnson County*, 6 Wall. 166, and *Amy* v. *The Supervisors*, 11 Wall. 136).

That state restraining order, far from being in conflict with any federal policy, actually enforced a basic and fundamental federal policy. For this case turns on the overriding federal principle of the Fourth Amendment with its condemnation of unreasonable searches and seizures, and its implementation through the doctrine that forbids the introduction in evidence of matter unlawfully obtained in violation of its provisions. In respect of that policy, the federal courts have blazed the trail, ever since *Weeks* v. *United States*, 232 U. S. 383, with the result that although the States are still not as rigidly limited by the Fourteenth Amendment in this field as is the United States by the Fourth (see *Wolf* v. *Colorado*, 338 U. S. 25; cf. *Irvine* v. *California*, 347 U. S. 128), it was said in 1949 that there were then 17 States that followed *Weeks* as against the single State which had anticipated the doctrine. See *Wolf* v. *Colorado*, 338 U. S. at 29, 33-38. A more recent compilation, see 50 A.L.R. 2d 531, 536, lists 22 states (including Alaska), together

with Hawaii, as now following *Weeks*, either by statute or decision.

Oregon, *non constat Wolf* v. *Colorado*, 338 U. S. at 34 and 38, has been in the *Weeks* column for some time. See *State* v. *Laundy*, 103 Ore. 443, 494, 204 Pac. 958, 974-975, 206 Pac. 290; *State* v. *McDaniel*, 115 Ore. 187, 199-209, 231 Pac. 965, 969-972, 237 Pac. 373. Those decisions have given to the search and seizure provision of the Oregon Constitution, Art. I, Sec. 9 (*infra*, p. A40) the same sanction that *Weeks* gave the Fourth Amendment to the federal Constitution. Accordingly, the Oregon rulings involved in this case that suppressed the evidence illegally taken from these petitioners (*supra*, pp. 5-6)—the Oregon law in action—correctly reflected the Oregon law in the books.

Thus the Oregon law and policy that both federal courts below brushed aside in this case were consistent with and in furtherance of federal law and policy, as the earlier Oregon law and policy (see *State* v. *Ware*, 79 Ore. 367, 373, 154 Pac. 905, 907) were not.[14]

It follows that the rulings below cannot be rested upon the Supremacy Clause—unless indeed that provision is to be invoked, as it was at the trial, not to establish the national paramountcy of the Constitution, but rather to excise from that instrument the protections and prohibitions of the Fourth Amendment.

Second. Even if we should be wrong in urging that the state restraining order—which was, very plainly (see pp. A30-A34, *infra*), issued on the authority of *Rea* v. *United States*, 350 U. S. 214—should have been accorded,

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[14] *State* v. *Folkes*, 174 Ore. 568, 588-589, 150 P. 2d 17, 25, certiorari denied, 323 U. S. 779, rejected the federal rule of *McNabb* v. *United States*, 318 U. S. 332, with respect to a confession. We do not read that decision as repudiating the *Weeks* rule, and as this record shows, the lower Oregon courts do not so read it either.

because entitled to, comity, it still does not follow that petitioners' conviction can be upheld.

Here, as has been indicated, we do not have the *Rios* complication of a reexamination of the original search and seizure. Therefore it is not necessary in this case to inquire whether the federal court was bound by the original state determination, or whether it was free, on a second and more extended hearing, to arrive at a contrary conclusion. On the present record, the Government conceded for purposes of the case that the original search and seizure was illegal (1 MS 84); both courts below made the same assumption (*infra*, pp. A9, A19-A21); and the grounds on which the state courts so held, the lack of probable cause in the affidavit supporting the search warrant (R. 61, 64, 67), are recognized by the courts of the United States (e.g., *Sgro* v. *United States*, 287 U. S. 206, and cases there cited; cf. Criminal Rules 41(c) and 41(e), *infra*, pp. A42-A43) as well as by the courts of Oregon. *Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871; *State* v. *McDaniel*, 115 Ore. 187, 193-194, 231 Pac. 965, 967, 237 Pac. 373. Both the Fourth Amendment to the Constitution of the United States as well as Art. I, Sec. 9, of the Constitution of Oregon forbid, in substantially identical language, the issuance of search warrants except on affidavits that make a showing of probable cause. See also O.R.S. §§ 141.030, 141.990 (*infra*, p. A42). The constitutional norm is therefore the same. It therefore follows that, for purposes of this case, the evidence used against petitioners in the federal prosecution was obtained in violation of their rights under the federal Constitution.

That being so, and since on this record petitioners are bound by the concurrent findings of the court below that there was no federal participation in the illegal state search and seizure (*infra*, pp. A9, A24), we recur to our Question 3 (*supra*, p. 3)—identical with Question 2 in *Rios*, 359 U. S. 965—which, briefly stated, is whether the so-called "silver platter" doctrine (*Lustig* v. *United*

States, 338 U. S. 74, 78-79) is still law. Petitioners attacked that rule vigorously below, both at the trial and in the court of appeals.[15]

In *Weeks* v. *United States*, 232 U. S. 383, 398, this Court, while directing the suppression of evidence illegally seized by federal officers, approved the introduction of items similarly seized by state officers. The same distinction was repeated in *Byars* v. *United States*, 273 U. S. 28, 33, but only by way of dictum, inasmuch as the Court found federal participation in the state search and seizure that was there involved. The point was left open in *Lustig* v. *United States*, *supra*, 338 U. S. at 79, where again there was a finding of federal participation in the illegal search and seizure; and in *Benanti* v. *United States*, 355 U. S. 96, 102, note 10, it was suggested that the question was still open.

We urge that this Court reexamine so much of the *Weeks* case as approved the admission of the fruits of the unlawful state seizure. Whether *Weeks* on that point was undercut by *Wolf* v. *Colorado*, 338 U. S. 25, as Judge Hastie suggested in *Hanna* v. *United States*, 260 F. 2d 723 (D. C. Cir.), may well await plenary argument on the merits. It is sufficient now to say that in our view the state seizure aspects of *Weeks*, and indeed the "silver platter" doctrine generally, are inconsistent with the rationale of *Rea* v. *United States*, 350 U. S. 214. *Rea* held that state authorities were not free to enjoy the fruits of an illegal seizure handed them on a federal "silver platter"; why then should the federal authorities, who are subject to the Fourth Amendment as state authorities are not, be allowed greater freedom to use the fruits of an illegal seizure similarly handed them by state authorities? Our answer is that they should not be, and that

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[15] See ¶¶ (a) and (c) of their motion to suppress (R. 47, 48); ¶ VIII(a) of their motion for a new trial (R. 114); and Specification of Error 2(2) in the Court below (Appellants' Brief, pp. 51, 55-56).

accordingly the state aspect of *Weeks* and all expressions to the same effect "can no longer be guiding" (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 143).

Third. Out of an abundance of caution, we have included Question 4 (*supra*, pp. 3-4), which invokes the doctrine of *Grunewald* v. *United States*, 353 U. S. 391, to the effect that a court of appeals cannot sustain a conviction on the basis of facts that were not submitted for determination to the trier of facts below.

Here the Ninth Circuit considered and rejected petitioners' contention that the Federal search and seizure were unlawful, on the ground that (*infra*, p. A10) "the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§ 3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A."[16]

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[16] Inasmuch as the court below passed on this issue, it is not necessary for petitioners to assign error as to three subsidiary points:

(a) In view of the claim made in the motion to suppress (R. 46) and repeated at the hearing on that motion (1 MS 286-287; see note 13 at p. 19, *supra*, petitioners were in fact asserting a proprietary interest in the property seized, so that the statement of the court below to the contrary (*infra*, pp. A10-A11) was plainly wrong.

(b) The court below indicated that petitioners had no standing to make the motion, because not aggrieved by the seizure (*infra*, p. A11), Elkins because his house was not originally searched, and Clark because the property was taken under the federal warrant from the Milwaukie bank. So far as the first reason is concerned, *McDonald* v. *United States*, 335 U. S. 451, 456, is square authority in petitioner Elkins' favor. Cf. *Jones* v. *United States*, 262 F. 2d 234 (D. C. Cir.), certiorari granted, 359 U. S. 988 (now No. 931, this Term).

(c) The second reason raises the question whether property in the custody of a state court may be seized pursuant to a federal search warrant; see pp. 18-19, *supra*. That question is not separately presented, since it probably will not be reached, and because in any event it is in petitioners' view a "subsidiary question fairly comprised" within their Question 1 (*supra*, p. 3) in the sense of this Court's Rule 23(1)(c).

But Rule 41(c), F. R. Crim. P. (*infra*, pp. A42-A43) prescribes that a warrant shall issue only on affidavit "establishing the grounds" for its issuance, and only after the judge or commissioner "is satisfied that grounds for the application exist or that there is probable cause to believe that they exist." Similarly, Criminal Rule 41(e) (*infra*, p. A43) provides that a motion to suppress may be based on the ground that "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued."

Those provisions on their face implement the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Consequently a federal search warrant issued upon an affidavit that does not establish probable cause is, necessarily, invalid. *Sgro* v. *United States*, 287 U. S. 206; *Byars* v. *United States*, 273 U. S. 28, 29. Indeed, it is a criminal offense to procure a search warrant to be issued "maliciously and without probable cause." 18 U.S.C. § 2235 (*infra*, p. A40).

Here, however, the trial judge held that the validity of the federal search warrant was immaterial, and accordingly cut off questioning on the issue of the affiant's knowledge or lack of it (2 MS 321-323, 520, quoted *supra* at p. 8, and in note 7, *supra*, pp. 8-9).

If, therefore, all of petitioners' contentions going to the invalidity of the original state search and seizure are rejected, their convictions can only be sustained on the footing that the later federal search and seizure were valid. Yet the conclusions of the court below to that effect rests on an indispensable prerequisite to such validity that petitioners were not permitted to challenge.

In *Grunewald* v. *United States*, 353 U. S. 391, this Court held that a conviction could not be sustained on appeal on a theory that was never submitted to the trier of fact at the trial. We think that doctrine extends to

the present situation, particularly since the trial judge's ruling on the motion to suppress was necessarily determinative of the outcome of the later trial. Accordingly, since he denied that motion on the view that the validity of the federal search warrant was immaterial, and hence cut off inquiry seeking to establish the insufficiency of the affidavit underlying that warrant, a contention that had been duly alleged in the motion to suppress (¶ (b), R. 47), it follows that the court of appeals erred in sustaining the federal search and seizure on an assertion which assumed the very issue that the trier of facts advisedly refused to consider.[17]

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JUNE 1959.

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[17] The court below only recently gave effect to the *Grunewald* doctrine. See *Forman* v. *United States*, 259 F. 2d 128, 261 F. 2d 181, 264 F. 2d 955, certiorari granted, 359 U. S. 982 (No. 779, this Term).

APPENDIX

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

No. 15,738

April 27, 1959

Appeals from the United States District Court
for the District of Oregon.

Before MATHEWS, CHAMBERS and HAMLIN, Circuit Judges.

MATHEWS, Circuit Judge.

On February 4, 1957, in the United States District Court for the District of Oregon, appellants (James Butler Elkins and Raymond Frederick Clark), hereafter called defendants, were indicted in nine counts. On February 18, 1957, defendants were arraigned, pleaded not guilty and were granted permission "to move against the indictment" on or before March 18, 1957.[1] Defendants did not so move on or before March 18, 1957.

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[1] See Rule 12(b)(3) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

On March 19, 1957, defendants filed a motion improperly entitled "Motion to dismiss the indictment."[2] On March 29, 1957, defendants filed a motion improperly entitled "Supplemental motion to dismiss the indictment."[3] The motion of March 19, 1957, was denied on April 2, 1957. The motion of March 29, 1957, was denied on April 12, 1957.

On March 25, 1957, defendants filed a motion improperly entitled "Motion for return of seized property and suppression of evidence."[4] That motion was denied on April 12, 1957.

On March 12, 1957, the case was set for trial on March 26, 1957. On March 18, 1957, defendants filed a motion for continuance, thereby seeking postponement of the trial to a date at least 90 days after March 26, 1957—in other words, to June 24, 1957, or later. On March 20, 1957, the District Court ordered the trial postponed to April 16, 1957, thus granting in part and denying in part the motion of March 18, 1957. On April 13, 1957, each defendant filed a motion for continuance, thereby seeking postponement of the trial to a date at least 30 days after April 16, 1957—in other words, to May 16, 1957, or later. The motions of April 13, 1957, were denied on April 15, 1957.

Defendants had a jury trial beginning on April 16, 1957, and ending on May 11, 1957. On May 9, 1957, at the

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[2] Actually, the motion of March 19, 1957, was not a motion to dismiss the indictment, but was a motion (1) to dismiss counts 2-9 of the indictment and (2) for a bill of particulars if counts 2-9 were not dismissed.

[3] Actually, the motion of March 29, 1957, was the first and only motion of defendants to dismiss the indictment.

[4] Actually, the motion of March 25, 1957, was not a motion for return of seized property and suppression of evidence, but was a motion for an order directing that certain property be suppressed as evidence against defendants. No return of property was sought.

close of the evidence offered by the Government, defendants moved for judgments of acquittal. Thereafter, on May 9, 1957, counts 3 and 4 of the indictment were dismissed, and the motions for judgments of acquittal were denied. No evidence was offered by either defendant. However, on May 10, 1957, the motions for judgments of acquittal were renewed and again denied. Thereafter the case was argued, the jury was charged, and on May 11, 1957, a verdict was rendered finding defendants guilty on counts 1, 2 and 5-9 of the indictment.

On May 15, 1957, the time for filing a motion for a new trial and a motion in arrest of judgment was extended to May 21, 1957.[5] On May 16, 1957, defendants renewed their motions for judgments of acquittals.[6] On May 21, 1957, defendants filed a motion for a new trial and a motion in arrest of judgment. On May 24, 1957, two judgments of conviction were entered—one against Elkins and one against Clark.

The judgment against Elkins sentenced him on count 1 to be imprisoned for a period of ten months and to pay a fine of $1,000; on count 2 to be imprisoned for a period of ten months and to pay a fine of $1,000; on each of counts 5-9 to be imprisoned for a period of six months; the two periods of ten months each to run consecutively; the five periods of six months each to run concurrently with each other and with the second period of ten months. Thus Elkins was sentenced to be imprisoned for a total period of twenty months and to pay fines totaling $2,000.

The judgment against Clark sentenced him on count 1 to be imprisoned for a period of four months and to pay a fine of $250; on count 2 to be imprisoned for a period of

[5] See Rules 33 and 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

[6] See Rule 29(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

sixty days and to pay a fine of $250; on each of counts 5-9 to be imprisoned for a period of sixty days; the period of four months and the first mentioned period of sixty days to run consecutively; the five remaining periods of sixty days each to run concurrently with each other and with the first mentioned period of sixty days. Thus Clark was sentenced to be imprisoned for a total period of four months and sixty days and to pay fines totalling $500.

On June 17, 1957, the District Court entered an order denying the motions for judgments of acquittal, the motion for a new trial and the motion in arrest of judgment. On June 18, 1957, the District Court entered supplemental judgments, supplementing the judgments of May 24, 1957, by adding to and including in each of them an award of costs to the Government. These appeals are from the judgments of May 24, 1957, and the supplemental judgments of June 18, 1957.[7]

Defendants' brief contains 15 specifications of error.[8]

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[7] Defendants obtained many extensions of the time for filing the record and docketing the appeals. Consequently, the record was not filed, nor were the appeals docketed, until May 28, 1958. Defendants' brief was not filed until October 31, 1958.

[8] Our Rule 18 (formerly Rule 20) provides:

"1. Counsel for the appellant shall file with the clerk of this court, 20 copies of a printed brief * * *

"2. This brief shall contain * * *

"(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. * * *

These will be considered in such order as may seem to us convenient.

Specification 14 says that the District Court erred "in failing to allow specification VI of defendants' motion to dismiss the indictment." The only motion of defendants to dismiss the indictment was the motion of March 29, 1957.[9] There was no "specification VI" of that motion.

Specification 14 also says that the District Court erred "in failing to allow defendants' motion in arrest of judgment," meaning, we suppose, that the District Court erred in denying the motion in arrest of judgment.

The stated ground of the motion in arrest of judgment was, in substance, that each count of the indictment failed to charge an offense against the United States. As indicated above, counts 3 and 4 of the indictment were dismissed at the close of the evidence offered by the Government. Furthermore, as indicated above, the sentences on counts 5-9 of the indictment added nothing to the sentences on counts 1 and 2. Hence, in so far as the motion in arrest of judgment related to counts 3-9, its denial—right or wrong—did not prejudice defendants. Hence we are not required to decide whether counts 3-9 charged offenses against the United States.[10] There remain for consideration counts 1 and 2.

Count 1 alleged: "That from on or about the 1st day of August, 1955, and continuously thereafter up to and in-

[9] The denial of the motion of March 29, 1957, is not specified as error.

[10] Lawn v. United States, 353 U.S. 339; Haid v. United States, 9 Cir., 157 F. 2d 631; Jaynes v. United States, 9 Cir., 224 F. 2d 367; Toliver v. United States, 9 Cir., 224 F. 2d 743; Paquet v. United States, 9 Cir., 236 F. 2d 203; Simpson v. United States, 9 Cir., 241 F. 2d 222; Chin Bick Wah v. United States, 9 Cir., 245 F. 2d 274; Donaldson v. United States, 9 Cir., 248 F. 2d 364; Robinson v. United States, 9 Cir., 262 F. 2d 647; Stein v. United States, 9 Cir., 263 F. 2d 579.

cluding the month of July, 1956, in the District of Oregon, [defendants] did unlawfully, willfully and knowingly conspire, combine, confederate and agree together and with each other and with diverse other persons whose names are to the Grand Jury unknown, to commit certain offenses against the United States of America, to-wit: to intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications, in violation of [47 U.S.C.A. §§ 501 and 605]; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. * * *"

Count 1 further alleged that it was a part of the conspiracy that certain acts would be done by defendants. These acts were described in four paragraphs of count 1 numbered 2 to 5, inclusive. Count 1 further alleged that, to effect the object of the conspiracy, eight overt acts were done—six by Elkins, one by Clark and one by both defendants. These acts were described in eight paragraphs of count 1 numbered (1) to (8), inclusive.

Thus count 1 charged an offense against the United States, namely, a violation of 18 U.S.C.A. § 371.[11]

Count 2 alleged: "That [defendants], on or about August 23, 1955, in the District of Oregon, did knowingly,

[11] Section 371 provides:

"If two or more persons conspire * * * to commit any offense against the United States, * * * and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

willfully and unlawfully, without authority of the senders thereof, intercept and record or cause to be intercepted and recorded, wire communications between William M. Langley and Thomas E. Maloney, and divulge or cause to be divulged the existence of such intercepted communications to others, to-wit: William M. Langley, Clyde C. Crosby and others whose names are to this Grand Jury unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America." Thus count 2 charged an offense against the United States, namely, a violation of 47 U.S.C.A. §§ 501[12] and 605.

The relevant provision of § 605—the provision on which count 2 was based—is that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." As used in this provision, the term "any communication" includes intrastate communications.[13] Defendants therefore contend that this provision is unconstitutional. There is no merit in this contention.[14]

Specification 1 says that the District Court erred "in denying defendants' motion to dismiss (or in the alternative) a motion to require the Government to furnish a

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[12] Section 501 provides: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter [47 U.S.C.A. §§ 151-609] prohibited or declared to be unlawful, * * * shall, upon conviction thereof, be punished for such offense * * * by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; * * *"

[13] Weiss v. United States, 308 U.S. 321; United States v. Sugden, 9 Cir., 226 F. 2d 281; United States v. White, 7 Cir., 228 F. 2d 833; Massengale v. United States, 6 Cir., 240 F. 2d 781; Lipinski v. United States, 10 Cir., 251 F. 2d 53.

[14] Weiss v. United States, supra; Massengale v. United States, supra; Lipinski v. United States, supra.

bill of particulars in certain instances," meaning, we suppose, that the District Court erred in denying the motion of March 19, 1957—the motion which sought (1) dismissal of counts 2-9 of the indictment and (2) a bill of particulars if counts 2-9 were not dismissed.

The stated ground of that part of the motion of March 19, 1957, which sought dismissal of counts 2-9 was, in substance, that counts 2-9 failed to charge offenses against the United States. We have shown that count 2 charged such an offense, and that no decision is necessary as to whether counts 3-9 charged such offenses.

That part of the motion of March 19, 1957, which sought a bill of particulars was addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[15] The record shows no abuse of that discretion.

Specification 2 says that the District Court erred in denying "the motion to suppress," meaning, obviously, the motion of March 25, 1957, reading as follows: "Come now [defendants], by and through their attorneys, and move [the District Court] for its order directing that certain property of which defendants herein are [on March 25, 1957] the owners, a schedule of which is annexed hereto and made a part hereof,[16] * * * be suppressed as evidence against these defendants and each of them in

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[15] Wong Tai v. United States, 273 U.S. 77; West v. United States, 9 Cir., 12 F. 2d 776; Cummings v. United States, 9 Cir., 15 F. 2d 168; Rubio v. United States, 9 Cir., 22 F. 2d 766; Fiddelke v. United States, 9 Cir., 47 F. 2d 751; Sutton v. United States, 9 Cir., 79 F. 2d 863; Shreve v. United States, 9 Cir., 103 F. 2d 796; Maxfield v. United States, 9 Cir., 152 F. 2d 593; Himmelfarb v. United States, 9 Cir., 175 F. 2d 924; Remmer v. United States, 9 Cir., 205 F. 2d 277.

[16] The annexed schedule listed the following property: Five electronic tape recordings, one Minifon recording machine and three spools of Minifon recording wire.

this and any other criminal proceedings against them, or each of them." No other motion to suppress was made or filed in this case.

In support of the motion of March 25, 1957, an affidavit of William J. Crawford, one of defendants' attorneys, was filed by defendants on March 26, 1957. The District Court heard the motion on April 9-12, 1957. At that hearing, defendants adduced the testimony of 16 witnesses, but defendants themselves did not, nor did either of them, testify at that hearing or at all.

The stated ground of the motion of March 25, 1957, was, in substance, that the property mentioned therein was unlawfully searched for and seized by officers of the State of Oregon on May 17, 1956, and by Federal officers on September 5, 1956.

The record shows that the property mentioned in the motion of March 25, 1957, was searched for and seized at Portland, Oregon, on May 17, 1956, by officers of the State of Oregon. However, the motion did not say, nor does the record show, that any Federal officer participated in the State search and seizure—the search and seizure made on May 17, 1956. Instead, the record shows that there was no such participation. Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized.[17] Hence the question of the lawfulness of the State search and seizure need not be considered.

The record shows that the property mentioned in the motion of March 25, 1957, was searched for and seized

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[17] Burdeau v. McDowell, 256 U.S. 465; Hall v. United States, 9 Cir., 48 F. 2d 66; Symons v. United States, 9 Cir., 178 F. 2d 615; Parker v. United States, 9 Cir., 183 F. 2d 268; Andersen v. United States, 9 Cir., 237 F. 2d 118; Rios v. United States, 9 Cir., 256 F. 2d 173.

at Milwaukie, Oregon, on September 5, 1956, by Ronald E. Sherk, an agent of the Federal Bureau of Investigation, under a search warrant issued on September 5, 1956, by Claire Mundorff, a United States commissioner within the District of Oregon, on an affidavit made and sworn to by Agent Sherk before Commissioner Mundorff on September 5, 1956. There was no other search for or seizure of the property by any Federal officer or officers.

The record shows that the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§ 3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

Subdivision (e) of Rule 41 provides: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *"

As indicated above, the motion of March 25, 1957, did not seek return of the property mentioned therein, but merely sought suppression of the property as evidence against defendants; nor was the motion based on any of the five grounds specified in subdivision (e) of Rule 41.

The motion did not say, nor does the record show, that the Federal search and seizure were made at any house or place owned, occupied or used by defendants or either of them. Instead, the record shows that the Federal search and seizure were made at the First State Bank of Milwaukie, Oregon. The motion did not say, nor does the

record show, that, at the time of the Federal search and seizure—September 5, 1956—defendants or either of them owned or had any proprietary interest in the property seized,[18] or that the property was at that time in the custody or possession of defendants or either of them. Instead, the record shows that the property was not in the custody or possession of defendants or either of them at any time after May 17, 1956.

Hence, so far as the record shows, defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized.[19] Hence we are not required to consider defendants' contention that the Federal search and seizure were unlawful. However, we have considered it and find no merit in it.

Specification 3 says, in effect, that the District Court erred (1) in denying in part the motion for continuance filed on March 18, 1957, and (2) in denying the motion for continuance filed on April 13, 1957. These motions were addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[20] The record shows no abuse of that discretion.

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[18] As indicated above, the motion contained a statement to the effect that the property seized was, on March 25, 1957, the property of defendants. That, however, was immaterial, if true; for, as indicated above, the Federal search and seizure were made on September 5, 1956.

[19] Patterson v. United States, 9 Cir., 31 F. 2d 737; Kwong How v. United States, 9 Cir., 71 F. 2d 71; Whitcombe v. United States, 3 Cir., 90 F. 2d 290; Creech v. United States, 5 Cir., 97 F. 2d 390; Wilson v. United States, 10 Cir., 218 F. 2d 755; United States v. Ponder, 4 Cir., 238 F. 2d 825; Accardo v. United States, D.C.Cir., 247 F. 2d 568; United States v. Pepe, 2 Cir., 247 F. 2d 838.

[20] Crono v. United States, 9 Cir., 59 F. 2d 339; Kramer v. United States, 9 Cir., 168 F. 2d 515; Williams v. United States, 9 Cir., 203 F. 2d 85; Hutson v. United States, 9 Cir., 238 F. 2d 167; Sherman v. United States, 9 Cir., 241 F. 2d 329.

Specification 12 and a part of specification 13 relate to the admission of evidence at the trial,[21] but do not, as required by our Rule 18,[22] quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 and the part of specification 13 which relates to the admission of evidence.[23] However, we have considered them and find no merit in them.

Specifications 4, 5, 6, 11 and 15 and a part of specification 13 relate to the District Court's charge to the jury, but do not, as required by our Rule 18, set out the instructions referred to[24] totidem verbis, together with the grounds of the objections urged at the trial. Hence we are not required to consider specifications 4, 5, 6, 11 and 15 and the part of specification 13 which relates to the charge.[25] However, we have considered them and find no merit in them.

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[21] The evidence referred to in specification 12 was the testimony of eight witnesses—George Minielly, Terry D. Schrunk, Oscar D. Howlett, Howard R. Lonergan, Claude F. Cross, Vayne M. Gurdane, James C. Darby and William M. Langley. The evidence referred to in specification 13 consisted of exhibits.

[22] See footnote 8.

[23] Ziegler v. United States, 9 Cir., 174 F. 2d 439; Mosca v. United States, 9 Cir., 174 F. 2d 448; DuVerney v. United States, 9 Cir., 181 F. 2d 853; Lii v. United States, 9 Cir., 198 F. 2d 109; Cly v. United States, 9 Cir., 201 F. 2d 806; Gordon v. United States, 9 Cir., 202 F. 2d 596; Lee v. United States, 9 Cir., 238 F. 2d 341.

[24] Specifications 4, 11 and 15 refer to instructions given. Specifications 5, 6 and 13 refer to instructions refused. The instructions referred to in specifications 4, 5, 6, 11 and 13 were on the subject of interception. The instructions referred to in specification 15 submitted a form of verdict to the jury and told the jury how to use it.

[25] Ziegler v. United States, supra; Mosca v. United States, supra; DuVerney v. United States, supra; Lii v. United States, supra; Cly v. United States, supra; Gordon v. United States, supra.

Specifications 7, 8 and 9 say, in effect, that the District Court erred in denying the motions for judgments of acquittal—the motions made and denied on May 9, 1957, renewed and denied on May 10, 1957, renewed on May 16, 1957, and denied on June 17, 1957. The stated ground of these motions was, in substance, that the evidence was insufficient to sustain a conviction of either defendant on any count of the indictment. The evidence was amply sufficient to sustain a conviction of each defendant on counts 1 and 2. Since counts 3 and 4 were dismissed at the close of the evidence offered by the Government, and since the sentences on counts 5-9 added nothing to the sentences on counts 1 and 2, we are not required to decide whether the evidence was sufficient to sustain a conviction of defendants or either of them on counts 3-9 or any of them.[26]

Specification 10 says, in effect, that the District Court erred in denying the motion for a new trial. That motion was addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[27] The record shows no abuse of that discretion.

Judgments affirmed.

(Endorsed:) Opinion. Filed April 27, 1959.

Paul P. O'Brien, Clerk.

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[26] See cases cited in footnote 10.

[27] Gage v. United States, 9 Cir., 167 F. 2d 122; Eagleston v. United States, 9 Cir., 172 F. 2d 194; Grover v. United States, 9 Cir., 183 F. 2d 650; Adams v. United States, 9 Cir., 191 F. 2d 206; Balestreri v. United States, 9 Cir., 224 F. 2d 915; Steiner v. United States, 9 Cir., 229 F. 2d 745; Bloch v. United States, 9 Cir., 238 F. 2d 631; Pool v. United States, 9 Cir., 260 F. 2d 57; Pitts v. United States, 9 Cir., ... F. 2d ...; Straight v. United States, 9 Cir., ... F. 2d ....

APPENDIX B

Judgments Below

(1) Original Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,738

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Judgment

Appeals from the United States District Court
for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and each of them hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: April 27, 1959
PAUL P. O'BRIEN, Clerk.

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(2) Judgment on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, May 28, 1959

Before MATHEWS, CHAMBERS and HAMLIN, Circuit Judges.

Order Denying Petition for Rehearing, etc.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants, filed May 27, 1959, and within time allowed therefor by rule of court, for a rehearing of the above-entitled cause be, and hereby is denied.

IT IS FURTHER ORDERED that the suggestion of Appellants for a rehearing, en banc, be, and hereby is denied.

APPENDIX C

Opinion of Court Below Denying Stay to Enable the Filing of a Petition for a Writ of Prohibition

Filed Apr 22 1957
Paul P. O'Brien, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

15522

In re Petition of JAMES BUTLER ELKING and RAYMOND FREDERICK CLARK, Petitioners, for a stay to enable the filing of a petition for Writ of Prohibition.

Undocketed

ORDER

ON MOTION TO STAY

Before STEPHENS, POPE and LEMMON, Circuit Judges.

Per Curiam.

Petitioners seek an order in effect granting a three day stay of proceedings in a criminal prosecution against them now going forward in the United States District Court of the District of Oregon, so that petitioners may have time to prepare and present here a petition for writ of prohibition to prevent the said District Court from re-

ceiving in evidence during trial of that case, certain tape recordings, and evidence concerning their import. We have heard argument on this application, and we necessarily inquire, initially, whether we may or should entertain an application for a writ of prohibition if and when such an application is presented.

The prosecution in the District Court is for violation of the federal wiretapping statute, Title 47, § 605. Prior to the federal indictment petitioners were charged with a similar offense under the laws of Oregon. Those State proceedings were instituted when a State search warrant was issued and executed, and in the process of search of petitioner Clark's residence certain tape recordings were found. Petitioners promptly moved in the appropriate Oregon court to suppress this evidence, and the motion was granted in the State court and the tapes in question were ordered delivered to the State Attorney General subject to the order of the court. They were placed by him in a bank for safe keeping.

Thereafter the F.B.I., through search warrant, procured possession of these tape recordings from the bank, and the indictment and prosecution in the federal court followed. These petitioners then went into an Oregon court and procured an injunction against the State and County officials who participated in the original procedure whereby the tape recordings were seized, restraining them from testifying or producing evidence relating to those recordings in the federal court. The injunction of the State court was issued upon that court's stated view that it was its duty thus to prevent the State agents from using the fruits of their lawful acts by which they have illegally searched the premises of a person entitled under Oregon law to protection against such searches and seizures. In this respect the action of the Oregon court resembled that ordered in Rea v. United States, 350 U.S. 214. It cited that case in its decision.

It is here alleged that notwithstanding the action of the Oregon courts mentioned, the Judge of the United States District Court, who has rejected petitioner's motion to suppress the tape recordings, is about to receive the same in evidence, and to compel the State agents to testify concerning them, and will do so unless the writ of prohibition is granted. It is conceded that an unlawful seizure by State officers, not participated in by federal officials, does not render the thing seized inadmissible in the federal courts. Feldman v. United States, 322 U.S. 487, Wolf v. Colorado, 338 U.S. 25. But we are urged to grant this relief upon some principle akin to comity between State and Nation which should require the federal courts to reject the fruits of the State officials' violation of state law.

We are aware of no authority which permits us to base an order on that principle here. The writ of prohibition is a discretionary one, which should be sparingly issued in exceptional cases only, and only when required in aid of our appellate jurisdiction. La Buy v. Howes Leather Co., 352 U.S. 249, Roche v. Evaporated Milk Association, 319 U. S. 21. The prospective witnesses who though enjoined by the State court may be subpoenaed by the federal court, are not the complaining parties here. As for the petitioners, their right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence. We are not now required to express any view as to their rights in that respect. Since we are of the view that a writ of prohibition may not be issued, the application for a stay is denied.

ALBERT LEE STEPHENS
WALTER L. POPE
DAL M. LEMMON
United States Circuit Judges

APPENDIX D

U. S. District Court's Oral Opinion Denying Petitioners' Motion to Suppress

(2 MS 519-531)

THE COURT [EAST, D. J.]: Inasmuch as this matter has consumed the best part of four days, I have had that entire period of time to give my entire attention to the legal issues that are raised by the hearing and of the contentions of the parties as we were advised of them almost at the threshold of the hearing. I think that in order to advise counsel as to what my thoughts are about it, I will just take it in the order that it was presented by counsel for the defendants upon their so-called first theory that the search made by the agents of the Federal Bureau of Investigation was not itself a valid search and seizure pursuant to Rule 41, Subsection E.

Now, for the reasons that were expressed the other day, this Court does not deem it necessary to decide that issue in order to determine whether or not the articles moved against are within the legal possession of this court now. Therefore, the Court will make no finding as to whether or not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal upon its face. Nor will this Court determine that the search and the seizure made by the special agent Sherk, as he said, in the belief that he was armed with a legal search warrant was in fact a legal exercise of search and seizure under such warrant. So, that disposes of the Court dealing with that proposition number one.

Now, with reference to the defendants' proposition two where an illegal search and seizure by State officers with

participation on the part of the Federal agency vitiates and, therefore, renders void any subsequent acquisition of the articles by that Federal agency or any of its personnel or any Federal personnel acting thereunder, our whole answer to that question is found within the interpretation of the United States Supreme Court of Lustig against the United States reported in Volume 338, United States Reports commencing at page 74. That was a five to four split decision among the nine justices of the court. The majority of the court held on various grounds, not in agreement among themselves, that under the particular facts and circumstances of that case there was such participation on the part of a Federal Officer that tainted his possession and his seizure of the property with the illegality of the search initiated by the State officials. There again there is a split of authority among the nine—of opinion among the nine justices as to the factual situation in that case.

I think it must be conceded that the majority, for reasons known to them only, stated that there was reserved a question which they did not feel that it was necessary for them to decide at that instant because they had disposed of the issue upon other grounds. And that is whether or not the doctrine originally in the so-called Byars case and then further extended in the Lustig case should even go further and render it even unnecessary—I should say, render it either unnecessary to determine whether or not the Federal authorities participated in the State illegal search and seizure because it would—the query, would not the State's illegal search and seizure of the articles in the first instance in and of itself thereafter render illegal any subsequent possession by Federal authorities?

So, in the language of Justice Frankfurter who points up that reservation by saying that he finds it unnecessary to decide whether an illegal search by the State officers bars the introduction of the fruits of the search

in a Federal court, the justice joins in that opinion they being Justice Murphy with whom Justices Douglas and Rutledge concur. But, Justice Murphy goes further and says: "But my dissenting views in Wolf vs. Colorado decided this day, make clear my position on the question he"—meaning Justice Frankfurter—"reserves." in the majority opinion. Justice Murphy with the concurrence of Justice Douglas and Rutledge say, "It is my opinion the important consideration is the presence of an illegal search. Whether State or Federal officers did the searching is no consequence to the defendant and it should make no difference to us." That, of course, is a dissenting opinion. And, as of today it is not the decision of the Supreme Court of the United States.

The present opinion of the Supreme Court of the United States is succinctly stated as follows by Mr. Justice Reed in his dissenting opinion to the holding and judgment of Lustig vs. United States wherein he says: "My understanding of the rule as to the use of evidence in a Federal criminal trial obtained by State officers through a search and seizure conducted by them under State authority is this: While it is true that the mere participation in a State search of one who is a Federal officer does not render it a Federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violation of the Constitution by circuitous and indirect methods", citing the Byars case. In the Byars opinion this court went on to say that the Federal government had the right "to avail itself of evidence improperly seized by State officers operating entirely upon their own account, but the rule is otherwise when the Federal government itself through its agents acts as such, participates in the wrongful search and seizure." This is the rule which the Court affirms today.

This District Court sitting here today cannot anticipate whether or not the Supreme Court as it is constituted to-

day or might in the future be constituted will overrule that rule, nor can this District Court sitting today anticipate that the Supreme Court as it is constituted today will accept the opinion of Mr. Justice Murphy:—and Justices Douglas and Rutledge concurring in that—"The question whether State or Federal officers did the searching is of no consequence to the defendant and it should make no difference to the court."

In other words, if the search in the first instance was illegal by State officers it is vitiated and tainted forevermore and no subsequent acquisition of the same could be acquired by the Federal government without it being violative of the defendant's rights.

So, therefore, this Court must accept the law as it is today and that law is expressed in the Lustig case by reason of the facts that are set forth in that factual circumstance.

There again the nine justices could not among themselves agree as to what the facts were or the interpretation of the facts. Perhaps it's better. The District Court and the Court of Appeals who heard the matter found from the evidence that there was no participation by the Federal officer. The majority opinion reviewed the facts de novo and disagreed with the District Court. And, the Court of Appeals upon the facts found this from the facts: After Greene had in effect scouted about, peered through the keyhole, I think, was the expression, finding no evidence of a crime he communicated his suspicion to State Officers who thereupon entered the hotel room and made the search. And, the court says: "During all this time"—I will go back a little further. "At about four o'clock in the afternoon of the same day, Koerner and three city detectives secured a key from the manager of the hotel and entered Room 402. The police officers proceeded to empty the bags and the drawers of a bureau and thus came upon the evidence sought to be suppressed. What they

found indicated counterfeiting of currency rather than of race track tickets.

"During all this time, Greene had remained at police headquarters because he 'was curious to see what they would find.' On finding what they did find, Koerner sent word to Greene, who came to the hotel and examined the evidence in controversy. When Lustig and Reynolds eventually returned they were arrested and searched by the detectives. As various articles were taken out of their pockets, those deemed to have bearing on a counterfeiting currency were turned over to Greene. He observed that the ink on a $100 bill taken from Reynolds had not been tampered with. Greene was trying to discover what had been used to make the impression on the 'similitude' found in the room. After the search was completed Greene and the city police gathered up the articles revealed by the search and carried them to the police station. Some of these articles were given to Greene before he left Room 402; all were eventually turned over to him."

Now, most rightfully, upon that construction of the facts the Court found that Greene participated in the search and seizure, not necessarily at the inception of the same, but at a time before it was completed. And, he participated up to its completion thereafter. In applying those facts with that construction the court held that the search and seizure so participated in by Greene rendered the search and the seizure violative of the defendant's right under the Fourth Amendment to the Constitution and suppressed the evidence.

Now, one further extension of the Lustig doctrine is found in one of the cases the Court cited at a prior time in these proceedings. That was upon the Court's discussion of the motions to dismiss. That is the United States against White, arising in the Seventh Circuit and being a Circuit Court of Appeals decision reported in 228 Fed. (2d), commencing at page 832. Counsel will recall that in

that case that city police officers in connection with investigating a suspected narcotics charge—at least, one of them, intercepted a telephone conversation by using an extension phone with the knowledge of one of the participants to the conversation. The court adopted the rule that under such circumstances the interception of the telephone conversation was with consent and that therefore Section 605 of Title 47 U.S.C. had no application and would not render the information received by the interception of the telephone conversation inadmissible.

Then they were confronted with the following position of the defendant:

> "Defendants also charge, but fail to argue in their brief, that a search of White was violative of his constitutional right and money taken from his person should not have been admitted as evidence. We shall consider this point. At the trial, defense counsel moved orally and unsuccessfully to suppress evidence claimed to have been obtained by the Government by means of an illegal search and seizure. The oral motion to suppress did not allege that the property seized was the property of the defendants. In Samson vs. United States, the court said that this failure in itself 'would seem to be sufficient ground for the denial of the motion',"

and cites two other circuit court cases. However, this Court makes no particular—places no particular effect on that rule.

> "Moreover, in this case the alleged illegal search and seizure were made by officers of the City of Chicago, and not by a Federal agent. Even though the evidence thus obtained was turned over to the Federal government for prosecution of the defendants, that fact does not preclude the Federal authority from using the evidence,"

citing a Fifth Circuit case Shushan vs. United States. Then it states:

> "In Lustig vs. United States the court said: 'The crux of that doctrine is that a search is a search by a Federal official if he had a hand in it; it is not a search by a Federal official if evidence secured by State authorities is turned over to the Federal authorities on a silver platter.'
>
> "In this case the alleged searches and seizures were made by city police officers, and on the following day the Federal authorities became interested in the case. Federal agent Cass testified that it was on the latter date that he first became aware of the incidents involved. There was no other evidence of Federal participation. Even if the search and seizure were unreasonable, the Government none the less was entitled to use the evidence secured, unless there was such complicity by Federal officials as to bring the seizure within the prohibition of the amendments to the Federal Constitution. Parker vs. United States,"

a Ninth Circuit case.

So, in deciding this second contention of the defendants we take up his first exception of the rule which the defendants claim that this seizure by the State officers was solely for the purpose of prosecuting a Federal case or making a Federal prosecution. Now, it is most clear from the evidence and most certainly there is no evidence in this case which this Court can find that special agent Sherk or any of the personnel of the F.B.I. office in Portland or any other agent of the United States had any knowledge or information or suspicion of any kind that this search was being contemplated or was eventually made by the State officers until they read about it in the newspaper.

And, I recognize counsel's contention that there was some thought that the District Attorney of Multnomah

County contemplated a Federal prosecution when he wrote the letter of May 18th, the following day of the search, to the Attorney General of the State of Oregon wherein it is cited that the District Attorney believed that a Federal crime—that the articles seized were some evidence of a Federal crime.

However, there is nothing in that letter to indicate that that county official had any intention of making a Federal prosecution out of the case. He merely asked the Attorney General of the State of Oregon whether or not he would consent of this District Attorney going forward and presenting this matter to the Grand Jury.

The Court makes that as a finding of fact from the evidence produced.

Now, what was the purpose of the State officials in making this raid? I am of the official opinion, as it appears from all of the evidence in the case, that the search and seizure made by the State officials as shown by the evidence was conceived in their mind and was carried out and consummated with the sole view of obtaining evidence for a State prosecution as distinguished from a Federal prosecution.

Now, with reference to the exception two which the defendant claims changed the rule of the Lustig case—or, brings them within an exception to that apparent rule, I will put it that way—that because there was a common practice and understanding between the officials of Multnomah County and the F.B.I. officials for the District of Oregon that evidence seized by the State or, contra, by the Federal authority would be turned over to the county authorities for the purpose of the county authorities prosecution of a violation of a law under their jurisdiction.

Most certainly all of the officers who appeared have said that it was good police practice to exchange cooperative work, cooperative facilities, of one branch; that is, State

and Federal, in the help of each other in their respective spheres. Any common man would agree with that.

On the other hand, can it be said that because that is a good police practice that that is in and of itself violative of any citizen's rights under the Federal or State Constitution? Has there been a tacit understanding and an agreement and a search and seizure had in this case pursuant to a binding agreement between these individuals that evidence seized by them would not be used of any violation of a law under their jurisdiction but would be turned over to the other for prosecution solely of a violation of the law within their sphere of authority? That, of course, would be making one the agent of the other.

This record is entirely devoid of any such practice or understanding among the officers of the two spheres, State and Federal, as shown by the evidence in the case. So, for those reasons I am of the firm opinion that the defendants' motion for suppression of the articles referred to in the evidence and returning the same to them, if it be in the joint motion, should be denied in all respects.

I was hesitating and wondering whether it was necessary to make any further comment with reference to the legal position before the Court of one court interfering with the jurisdiction of the other. I think I will rely on what the record shows.

Now, you may make your record.

MR. CRAWFORD [Counsel for Petitioners]: We except to the ruling, if Your Honor please.

THE COURT: Very well.

MR. CRAWFORD: In all particulars as it is contrary to our contentions in this matter.

THE COURT: Let the record show your exception.

APPENDIX E

Opinion of Oregon Circuit Court Enjoining State Officers From Testifying Regarding Illegal Search and Seizure

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Plaintiffs,

vs.

GEORGE MINIELLY, TERRY SCHRUNK, HAL LYNN, GARTH STACKHOUSE, RICHARD SACANTI, ARTHUR HEEM, WILLIAM M. LANGLEY, ROBERT Y. THORNTON, VAYNE GURDANE, CLAUDE CROSS, F. O. MAISON, HOWARD LONERGAN, OSCAR HOWLETT, and other State and County officials unknown to plaintiffs, *Defendants.*

MEMO OPINION

REDDING, *Circuit Judge:*

Plaintiffs in the within suit now stand indicted by a Grand Jury for Multnomah County, State of Oregon, on substantially the same charge as that on which they are now being tried in the Federal District Court for the District of Oregon. This State indictment was based on evidence obtained by a search and seizure made pursuant to a search warrant issued on May 17, 1956, by a State Judge, the Honorable John R. Mears, Judge of the District Court for Multnomah County. Plaintiffs herein on May 21, 1956, the first judicial day subsequent to said search, moved to suppress the evidence on the ground that the search warrant was improperly obtained on a faulty affidavit, in that the Honorable William M. Langley, District Attorney for Multnomah County, who applied therefor, did not have personal knowledge of the facts set

forth in his affidavit upon which Judge Mears was prevailed upon to grant said search warrant.

On May 23, 1956, Judge Mears granted defendants' (plaintiffs herein) motion to suppress the evidence obtained in said illegal search and seizure. However, prior thereto and on May 22, 1956, a Grand Jury for Multnomah County acting under the supervision and direction of the Honorable William M. Langley, District Attorney for Multnomah County, returned the indictment hereinabove referred to. Subsequent thereto, and on September 17, 1956, the Honorable Frank J. Lonergan, Presiding Judge of the Circuit Court for Multnomah County, on motion of the defendants named in said State indictment, the plaintiffs herein, again held that the search and seizure based upon the above-mentioned search warrant was illegal and directed that the evidence obtained in the search made pursuant thereto be surrendered to the Attorney General of the State of Oregon and by him held pending the further order of the Court and that any copies made of any recordings or tapes obtained in said search be destroyed.

On September 5, 1956, certain Federal officials gained possession of certain tapes and/or recordings which it is contended in the above-mentioned Federal Court proceeding were obtained by State officials on May 17, 1956, by authority of the illegal search warrant of the same date.

In February, 1957, subsequent to Judge John R. Mears' finding that the search of May 17, 1956, based upon a search warrant which he issued was illegal, as well as subsequent to Judge Lonergan's holding that said search and seizure was illegal, a Federal Grand Jury, based upon certain recordings and/or tapes allegedly obtained upon said illegal search and seizure, returned an indictment against the plaintiffs herein. The plaintiffs are now on trial in the District Court of the United States for the District of Oregon on said Federal indictment. The case against them in the Federal District Court will be made

by testimony of State officers based on information obtained by them while conducting the illegal search of May 17th. That, at least, is the basis for this suit.

The defendants, having exhausted every remedy known to them or their counsel in the Federal District Court where they unsuccessfully sought suppression of the evidence allegedly seized from the home of Plaintiff Clark on May 17, 1956, when State officers, to wit, deputy sheriffs for Multnomah County acting pursuant to invalid State process, forced the front door of said home and allegedly removed therefrom certain personal property; plaintiffs now seek in this suit relief from threatened further wrong to them by State officers who by their testimony in Federal Court are about to divulge information which said State officers wrongfully obtained pursuant to State Court process erroneously issued.

The question posed by this suit does not involve a question of whether this Court has the power or authority to interfere with the Federal Court—were this the question, the answer would be simple and would, of course, be in the negative—but rather, the question here presented for decision is—Does a State Court have the power and authority to prevent further irreparable injury to the citizens of its state growing out of the abuse of its own process? Does it have the right to correct its own wrongs where State officers, acting illegally by virtue of an abuse of the State Court's own process, violate the Constitutional rights of a resident of the State of Oregon? In other words, does a State Court of the State of Oregon, upon discovery of an abuse of the State Court's own process, have power to prevent its officers from testifying as to matters which were learned of solely and exclusively through and by virtue of such illegal State process in direct contravention of the Constitutional guarantees of the Constitution of the State of Oregon? The Attorney General of the State of Oregon—the Honorable Robert Y. Thornton—upon careful consideration states he can

see no legal obstacle to the exercise of such power. This question, it would appear to this Court, must, of necessity, be answered in the affirmative.

The general view of the Federal Courts is that evidence, though obtained by an illegal search, is nevertheless admissible in a Federal Court where the search was made for the purpose of enforcing State law by State officers without Federal participation. This proposition is supported by numerous cases, among which are the following: *Weeks* v. *United States* (1914), 232 U. S. 383; *United States* v. *Diuguid* (1945), 325 U. S. 857; *United States* v. *Pugliese* (1945), 330 U. S. 811, stating that: "It is well-settled that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account." Also see note in 50 A.L.R. 2d 531 at 573.

If I may be so bold, may I interject I find it difficult to understand or accept this Federal rule. I find far more palatable the view expressed by Mr. Justice Murphy and concurred in by Mr. Justice Douglas and Mr. Justice Rutledge in Mr. Justice Murphy's dissenting opinion in Lustig v. United States, 338 U. S. 74, where Mr. Justice Murphy says:

> "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us."

It is encouraging to note in recent decisions of the Supreme Court of the United States upon this subject what I discern to be an ever greater sympathy for the views expressed in the foregoing dissenting opinion by Mr. Justice Murphy as concurred in by Mr. Justice Douglas and Mr. Justice Rutledge.

Rea v. *United States*, 350 U. S. 214.

The corollary of the proposition that evidence obtained in an unlawful search and seizure by State officers without Federal participation is admissible in a prosecution in a Federal Court is the proposition that evidence obtained in an unlawful search and seizure by Federal authorities without participation of State or local officers is admissible in a prosecution in a State Court. This view has been followed in some of the states.

Inconsistent with the theory just stated is the view taken in other State jurisdictions that evidence obtained by Federal officers by a search and seizure unlawful under Federal law must be suppressed in a prosecution in the State Courts.

To this Court it is most reassuring that the rule heretofore followed in some states that evidence obtained in an unlawful search and seizure by Federal authorities without participation of State or local officers is admissible in a prosecution in a State Court has been rendered of little practical consequences by the 1956 decision of the United States Supreme Court in *Rea* v. *United States*, 350 U. S. 214.

The well-settled Federal rule that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account completely and conclusively deprives a Federal Judge of the power or the authority to prevent the reception of evidentiary matter though improperly seized by State officers in direct contravention of State Constitutional guarantees against unlawful search and seizure. This anomaly would completely and finally deprive the plaintiffs in this proceeding from relief either in the United States District Court of the State of Oregon where they now are on trial or, indeed, from relief on appeal from an adverse verdict in said Court though based upon evidence obtained in violation of their guarantees of freedom from unlawful search and seizure given them by the Constitution of the

State of Oregon unless this Court in this proceeding is determined to have and exercises the power to restrain the defendants herein named from giving testimony with reference to information obtained by and through the illegal State Court process hereinabove referred to.

The State Court, and the State Court only, has authority to control State officers; and it is the State's function, acting by and through the Courts, to determine its policy concerning illegal search and seizure.

This Court had primary jurisdiction over the subject matter of the property—personal property situated in an Oregon residence.

This Court had actual physical custody and jurisdiction of the articles in question—one Judge had already ruled the search was illegal and ordered the items turned over to the Attorney General, an indictment in State Court based on the articles had been returned and is still pending, another motion to suppress had been filed in Circuit Court and while it was pending the property was seized by the Federal officers; Judge Lonergan subsequently reiterated the holding that the search and seizure was void and ordered the tapes held by the Attorney General subject to the order of the Court.

The order sought of this Court in this proceeding would not interfere in any way with the jurisdiction or policy of the Federal Court. It would not restrain the State officers named defendant herein from testifying or from attending Federal Court or from responding to process. It simply restricts them from testifying concerning the "fruits" of the illegal tree and, in effect, says to the Government exactly what the Government has said to the States in the Rea case: You may make your own policy as to prosecution and prosecute as you wish but we will not permit our officers to violate our law by an abuse of this Court's own process and then use the illegally obtained information to help you prosecute.

Were it not for the well-settled Federal rule hereinabove referred to that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account, I would have abiding confidence that the plaintiffs herein in their trial before the able Federal Judge before whom they are presently being tried would have no occasion for apprehension of violation of their Constitutional rights—whether guaranteed by the Constitution of the State of Oregon or of the United States. Indeed, were it within the discretionary powers of the Federal Court to exclude evidence improperly seized by State officers acting illegally in contravention of the Constitutional guarantees of the Constitution of the State of Oregon, I would be the first to acknowledge it to be presumptuous of any Court or, indeed, any person to anticipate an abuse of that discretion by the learned Federal Trial Judge. Unfortunately, under the Federal rule, a Federal District Judge is powerless to exclude evidence of State officers, though such evidence be obtained in direct violation of State Constitutional guarantees, unless such illegal seizure is participated in by the Federal authorities.

In granting the plaintiffs the relief they seek in this proceeding, I do not consider that I am showing the slightest lack of confidence in the learned Federal Trial Judge's complete devotion to the concept of human rights enshrined in the history and the basic Constitutional documents of the English-speaking peoples. Indeed, the Federal Judge before whom the plaintiffs in this proceeding are presently on trial served with distinction as a member of the Circuit Court Bench of this state for many years. I prefer to believe I am causing to be done that which the learned Federal Trial Judge would, himself, do were he not prevented from so doing by the Federal rule that evidence, though obtained by an illegal search, is nevertheless admissible in a Federal Court where the search was made for the purpose of enforcing State law by State officers without Federal participation.

I entertain the view that the admissibility or non-admissibility of the evidence in a Federal Court does not diminish one whit the inherent obligation of a State Court to correct the abuse of its process.

Reluctant though I be, I conceive it to be my duty to redress so far as it is within my power the Constitutional wrong done the plaintiffs herein through the abuse of the State Court's own process by granting the plaintiffs herein the injunctive relief which they seek in this proceeding.

Rea v. *United States*, 350 U. S. 214, 100 L. Ed. 233.

APPENDIX F

Operative Portions of Federal Restraining Order Forbidding Petitioners From Pursuing Contempt Proceeding in State Court Against State Officials Who Disobeyed State Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, *Defendants*.

No. Civ 9175

TEMPORARY RESTRAINING ORDER

THIS MATTER having come on before the above-entitled Court, based upon the verified complaint of the plaintiff herein and the motion of the plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, acting pursuant to direction of The Attorney General of the United States; and the plaintiff

having moved the Court for a temporary restraining order without notice, praying that the defendants, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, be restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain Order to Show Cause entered on May 10, 1957 by the Circuit Court of the State of Oregon for Multnomah County directing that George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan show cause, on May 24, 1957 at the hour of 10:00 AM or as soon thereafter as the same might be heard, why they should not be held in contempt of said Circuit Court of the State of Oregon for Multnomah County as a result of giving their testimony in the United States District Court for the District of Oregon, cause No. C-18321; and it appearing to the Court that the plaintiff has alleged that:

[Par. I recited the commencement of the federal prosecution against petitioners. Par. II set forth the temporary restraining order issued by the Oregon Circuit Court (Redding, J.) in *Elkins and Clark* v. *Minielly et als.*, No. 238-958, on April 15, 1957. Par. III set forth the complaint in that case.]

IV.

That thereafter of the persons named as defendants in said action in the Circuit Court of the State of Oregon for Multnomah County, the following persons were subpoenaed on behalf of the plaintiff, the United States of America, by the Clerk of the United States District Court for the District of Oregon, to give testimony in said cause at various times during the course of said trial, which trial began on April 16, 1957 and was concluded on May 11, 1957:

George Minielly, Terry Schrunk, William M. Langley, Vayne Burdane, Claude Cross, Oscar Howlett and Howard Lonergan.

That each of said witnesses was advised by the above-entitled court that said state court restraining order was as to the proceedings then before the above-entitled court of no effect and that failure to answer relevant questions put to him in said cause would subject him to being in contempt of the United States District Court for the District of Oregon.

That being so advised each of said witnesses above-named did then and there answer questions put to them by the plaintiff and defendants pursuant to said subpoenas and direction of said court.

V.

That thereafter on the 10th day of May 1957, on the Motion of defendants herein as relators, said defendants herein did obtain from said Circuit Court of the State of Oregon, Multnomah County, as relators, an Order to Show Cause, directing the said witnesses to show cause on May 24, 1957 at 10:00 A.M. or as soon thereafter as the matter may be heard, why said witnesses should not be held in contempt of said court for giving of such testimony, which Order to Show Cause was based on a Motion by the relators and supported by Affidavit of their attorney, which Motion and Affidavit are in words and figures as follows:

[Motion and Affidavit omitted.]

VI.

That the proceeding under which the defendants were charged by indictment in the United States District Court for the District of Oregon was and is exclusively a matter within the jurisdiction of the above-entitled United States

District Court pursuant to the statutes of the United States.

VII.

That the power to subpoena witnesses and compel testimony in such cases is provided by Federal law and is necessary to the exercise of the jurisdiction of the Federal Court and in aid thereof.

VIII.

That unless restrained and enjoined therefrom, the said relators, the defendants herein, will prosecute and offer evidence in said Order to Show Cause in the Circuit Court of the State of Oregon for Multnomah County, against the aforesaid witnesses, all of which will subject said witnesses to exposure to penalty as for contempt for having testified under the process of this court, with the purpose and effect of harassing and intimidating said witnesses as a result of their giving testimony in a matter in which plaintiff submits they were required to give testimony under the laws of the United States and under the Supreme law of the land.

IX.

That such action of the relators would result in the irreparable harm to the United States, its courts and litigants therein, and particularly in Case No. C-18231, United States District Court for the District of Oregon.

X.

That the interest of the United States in its power to compel testimony is by such action in danger of irreparable subversion and there can be no more fundamental subversion of the function of a court than the frustration of its power to compel testimony, and the relators, defendants herein, have sought and are seeking to subvert such power of the court by the intimidation of witnesses with

the ultimate aim of obstructing justice thereby, by preventing the production of evidence ruled by this court to be admissible under the rules of this court and the laws applicable thereto.

XI.

That plaintiff has no plain, speedy and adequate remedy at law in the premises.

XII.

That jurisdiction hereof is based on Title 28, Section 1651, United States Code.

And it further appearing to the Court that said verified complaint further alleges and prays that because said Order to Show Cause has been fixed for hearing in the Circuit Court of the State of Oregon for Multnomah County for 10:00 A.M. on May 24, 1957, unless a temporary restraining order is forthwith issued, irreparable damage may result to the plaintiff before notice can be served; and it appearing to the Court that on the allegations of the complaint, a temporary restraining order should be issued; now, therefore, it is hereby

ORDERED:

1. That the defendants herein, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, be and are restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain proceeding in which George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan are ordered to show cause, in which the defendants, James Butler Elkins and Raymond Frederick Clark are relators and George Minielly and others are defendants, in which said cause the afore-

said witnesses are directed to appear and show cause why they should not be held in contempt of the said Circuit Court of the State of Oregon for Multnomah County as a result of giving their testimony in Case No. C-18321 in the United States District Court for the District of Oregon.

2. That this temporary restraining order shall remain in full force and effect for ten (10) days from the date hereof.

/s/ WILLIAM G. EAST
United States District Judge

ISSUED THIS 23rd day of May, 1957
at 10:15 o'clock A.M.

APPENDIX G

Constitutional Provisions, Statutes, and Rule of Court Involved

1. *Constitution of the United States:*

(a) Clause 2 of Article VI (the Supremacy Clause) is as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(b) The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. *Constitution of Oregon:*

Section 9 of Article I provides:

"**Section 9. Unreasonable searches or seizures.** No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

3. *Federal Statutes*

(a) Section 2235 of Title 18 provides:

"**§ 2235. Search warrant procured maliciously**

"Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1000 or imprisoned not more than one year."

(b) Section 501 of Title 47 provides:

"**§ 501. General penalty**

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

(c) Section 605 of Title 47 provides:

"§ 605. **Unauthorized publication or use of communications**

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broad-

cast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

4. *Oregon Statutes*

The provisions of the Oregon Revised Statutes (O.R.S.) here pertinent are as follows:

"141.030. **Affidavit of probable cause.** A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched."

* * * * * *

"141.090. **Penalties.** (1) Any person who maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. * * *"

5. *Rule of Court*

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

"**Rule 41. Search and Seizure**

* * * * * *

"**(c) Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property

specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

* * * * *

"(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS AND RAYMOND FREDERICK CLARK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

The factual and procedural context of the issues tendered by the petitioners is fully developed in the petition (pp. 4-16). We set forth here only the chronology of the events which culminated in the admission of the disputed evidence in the federal criminal trial, with some further details as to what the record shows concerning some of the proceedings.[1]

[1] We adopt in this memorandum petitioners' abbreviated designations of the various parts of the record.

On March 25, 1957, prior to their trial on the federal indictment filed on February 4, 1957, the petitioners moved for the return of seized property and its suppression as evidence, praying, *inter alia*, that the court order the return of "certain property of which defendants herein are the owners" (R. 13).[2] This motion, supported by an affidavit executed by the petitioners' counsel and various exhibits (R. 14, *et seq.*), alleged that on May 17, 1956, petitioner Clark's residence in Portland, Oregon, was searched pursuant to a warrant issued by a state court and that five tape recordings, a recording machine, and three spools of recording machine wire were seized from Mr. Clark. On May 21, 1956, petitioner Clark filed in the District Court for Multnomah County, Oregon, a motion for the return of the property and its suppression as evidence, attacking the state search warrant on the ground that it was not based on probable cause. On May 29, 1956, that court entered an order sustaining petitioner Clark's contention that the state search warrant was improperly issued and that the fruits of the search should be suppressed as evidence. The order directed that the items which had been seized be "impounded in the possession of the sheriff of Multnomah County, to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher circuit or Supreme Court before whom the matter may be heard" (R. 14, Exhibit E). Meanwhile, on May 22, 1956, a Multnomah County grand jury indicted the petitioners for the state offense of wiretapping (R. 13).

According to the further allegations of the peti-

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[2] This claim of ownership was expressly reaffirmed at the hearing on the motion (1 MS 286-287).

tioners' motion in the federal case, the Attorney General of Oregon deposited the tape recordings and other paraphernalia with the Oregon State Police for safekeeping and the police in turn lodged them in a safe-deposit box in a bank in Milwaukie, Oregon. On September 5, 1956, F.B.I. Agent Ronald E. Sherk obtained and executed at the bank a federal search warrant for these items, thus bringing them into federal custody (R. 13, 14).

The motion further alleged that during the week of September 15, 1956, both petitioners moved in the Oregon Circuit Court for Multnomah County for suppression of the tape recordings and other items as evidence in the state prosecution. The circuit court held on September 17, 1956, that the search and seizure of May 17, 1956, were illegal, because they were based on a faulty state warrant, but did not order either suppression or return of the property. Instead, the court ordered that it be turned over to the Attorney General of Oregon, to be held by him pending the further order of the court (R. 14, Exhibit F).

At a four-day hearing on the petitioners' motion to suppress in the federal criminal prosecution, it was shown that the tape recordings which the state officers found in their search of petitioner Clark's home on May 17, 1956, appeared to be recordings of telephone conversations taken directly from telephone wires (2 MS 309-311). The federal authorities had nothing to do with that search and had no knowledge of it (1 MS 66-67, 83). Mr. Schrunk, the then sheriff of Multnomah County, had called the F.B.I. some two to four days after the search (1 MS 86, 107-108, 127-129). The tape recordings had been played for F.B.I.

Agent Sherk at that time (1 MS 171). The state indictment filed on May 22, 1956, five days after the search, was for the state offense of wiretapping.

The federal search warrant issued and executed on September 5, 1956, prior to the state circuit court's order of September 17, 1956, which purported to place the property in question in the custody of the Attorney General of Oregon subject to the order of the court, was issued on the basis of Mr. Sherk's affidavit of the same date. Mr. Sherk stated in his affidavit that he had personally listened to tape recordings of intercepted telephone communications and had personal knowledge of the location of the tapes (R. 1, 2).

It was the position of the United States Attorney at the hearing on the motion to suppress that the legality or illegality of the state search under state law was immaterial, since there had not been any federal participation in that search; he said: "without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, * * * for the purposes of this matter we may treat it as illegal" (1 MS 84).

On April 12, 1957, at the close of the hearing on the motion to suppress, the trial judge held that the tape recordings and other items were admissible in the federal trial since "there is no evidence in this case which this Court can find that special agent Sherk * * * or any other agent of the United States had any knowledge or information or suspicion of any kind that this [state] search was being contemplated or was eventually made * * * until they read about it in the newspaper." (2 MS 528-529). Since the evidence was thus admissible under the so-called "silver platter"

doctrine, the judge declined to decide whether Mr. Sherk made a legal search under a valid federal search warrant issued on an affidavit establishing probable cause (2 MS. 520).

On April 15, 1957, the day before the trial below began, the Oregon Circuit Court for Multnomah County, in a civil suit filed by the petitioners, entered a temporary restraining order specifically enjoining George Minielly, Terry Schrunk, Oscar Howlett, Claude Cross, Vayne Gurdane, and William Langley (and other named persons who did not subsequently testify at the federal trial), as well as "all other State and County officers or officials having knowledge of this order", from giving testimony at the petitioners' federal trial with respect to any matter "concerning the alleged illegal search and seizure of May 17, 1956, in the premises of the plaintiff Clark" and "the items allegedly illegally seized in said search."[3]

The state court's order was presented to the federal trial judge at the opening of the petitioners' trial on April 16, 1957. He ruled that "the order just read so far as it attempts to interfere with the process of this Court here before issue [*sic*] is void and is a nullity and of no force and effect" (1 Tr. 5). In an oral opinion elaborating upon his reasons for this

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[3] Complaint for Injunction, pp. 2-3. This document is contained in the certified record of the proceedings in the government's suit, filed after the conclusion of the trial below, to enjoin the petitioners from prosecuting contempt charges in the state circuit court against the state officers who had testified at petitioners' trial. The petitioners have lodged this record with the Clerk of this Court.

The petitioners' suit in the state circuit court had been dismissed as to the witness Howard R. Lonergan on the petitioners' own motion. The witness James C. Darby was not named as a defendant in that suit. *Ibid.*

ruling, he stated that state and federal courts each work in their separate spheres, but "when they come in irreconcilable conflict Federal judiciary must prevail under the [supremacy clause of the] basic constitution" (1 Tr. 6-26).[4]

The tape recordings and other paraphernalia which the petitioners had unsuccessfully sought to have suppressed were admitted in evidence (Govt. Ex. 1-5; 1 Tr. 101, 113, 120, 122, 134, 194, 227; 2 Tr. 249-250, 270, 279) and, in accordance with the trial judge's ruling that the state court's injunction was invalid, six officers and officials of the State of Oregon and Multnomah County who had been involved in the state search and seizure and custodianship of the disputed evidence and who had been specifically enjoined from testifying by the state court—George Minielly, Terry Schrunk,

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[4] The trial judge's reference to "the process of this Court" indicates that the witnesses in question had already been subpoenaed to testify at the federal trial when the state court issued its injunction. The petitioners refer (Pet. 14) to the statement—"thereafter of the persons named as defendants in said action [brought by the petitioners] in the Circuit Court of the State of Oregon for Multnomah County, the following persons were subpoenaed on behalf of the plaintiff, the United States of America, by the Clerk of the United States District Court for the District of Oregon, to give testimony in said cause * * *: George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan"—which appears on page 8 of the government's complaint for an injunction against the petitioners (see fn. 3, p. 5, *supra*) and is repeated verbatim at page 8 of the restraining order issued by the federal court pursuant to that complaint, as indicating that the federal court's subpoenas were issued after the state court had issued its injunction. On the other hand, the state court's injunction recited that the petitioners' suit was dismissed as to the witness Lonergan on the petitioners' own motion for the reason that "he had not been subpoenaed in Federal Court" (Complaint for Injunction, p. 2). The clear implication from this is that the other named defendants in that suit had been subpoenaed.

Oscar D. Howlett, Claude F. Cross, Vayne Gurdane, and William Langley—were directed to and did testify at the trial below (4 Tr. 569-570, 573-577; 5 Tr. 799-804; 6 Tr. 808; 7 Tr. 1089-1094, 1152-1159, 1195, 1198-1199, 1202; 8 Tr. 1241-1244, 1265-1268, 1389-1391).

DISCUSSION

1. In *Rios* v. *United States*, No. 52, O.T. 1959, the second question listed in the limited grant of certiorari is whether, "If the evidence [in question] was unlawfully obtained, [it was] admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation." 359 U.S. 965. In this case, as in *Rios*, (1) the evidence was originally obtained by local officers without federal participation,[5] (2) state courts have concluded that the search and seizure were illegal under state law, and (3) the evidence was nevertheless admitted in the federal prosecution.[6] On the other hand, in the *Rios* case, unlike the situation here, the trial court ruled that it was not bound by the state court's order suppressing the evidence. It made an independent inquiry into the validity of the state search and seizure and found that there was probable cause to justify the arrest and search. The trial court's ruling and finding were sustained by the Court of Appeals. In view of

[5] The petitioners concede (Pet. 22) that they "are bound by the concurrent findings of the court below that there was no federal participation in the illegal state search and seizure."

[6] The Court of Appeals cited, *inter alia*, its own decision in *Rios* v. *United States*, 256 F. 2d 173, for the proposition that an unlawful state search without federal participation does not render the evidence seized inadmissible in a federal prosecution (Pet. App. A9).

these holdings below, the first question on which certiorari was granted in *Rios* is whether, "Independently of the state court's determination, * * * the evidence used against petitioner in the federal prosecution [was] obtained in violation of his rights under the Constitution of the United States." Consequently, in deciding the *Rios* case, the Court may not reach the issue concerning the "silver platter" doctrine involved in the second question.

Nevertheless, in view of the facts (1) that the "silver platter" rule was the exclusive basis for the decision of the trial court below and one of the grounds of decision in the Court of Appeals (see p. 9, *infra*) and (2) that the present vitality of that rule is before the Court in *Rios*, we do not oppose certiorari on that issue as it is involved in this case (see Pet. 21-24).

2. Although the petitioners would have it otherwise (Pet. 17-21), the action of the state circuit court in attempting to enjoin the state and county officers from testifying at the petitioners' trial concerning the evidence seized under the state warrant does not present a situation which is precisely the converse of that involved in *Rea* v. *United States*, 350 U.S. 214. In that case the state prosecution was initiated on a complaint sworn to by the federal agent who had made the unlawful search and seizure which resulted in the federal court's order suppressing the evidence. Here, the federal prosecution was initiated, not by the offending local officers, but by federal officers. Furthermore, the state court attempted to enjoin testimony by state officers who at the time were under federal subpoenas to appear in the federal prosecution. In *Rea*, it was not shown that the federal officer had been served with

state process (see the Government's Brief, No. 30, O.T. 1955, p. 4). We therefore believe that this case involves, not a question of comity between state and federal courts, as the petitioners argue, but the right of federal courts to be free from interference by state courts. If federal courts should refuse to intervene in state criminal proceedings once begun, *Stefanelli* v. *Minard*, 342 U.S. 117, 120, surely state courts have no authority to interfere with a federal prosecution.

The questions raised by this aspect of the case are, however, closely related to the "silver platter" issue discussed above. We therefore do not oppose certiorari on these questions.

3. The petitioners contended in the trial court and in the Court of Appeals that the search and seizure under the federal warrant were unlawful. The Court of Appeals considered this contention and found no merit in it (Pet. App. A9-A11. The petitioners do not now affirmatively assert that this warrant was invalid. They do claim that the trial court did not permit them, at the hearing on their motion to suppress, to make full inquiry into the basis and extent of F.B.I. Agent Sherk's knowledge in executing the affidavit for the warrant, ruling instead that this was immaterial because the evidence was admissible under the "silver platter" doctrine, and that in these circumstances it was error for the Court of Appeals to sustain the conviction on the independent ground that the search and seizure under the federal warrant were valid (Pet. 24-26).

Having pressed the issue as to the validity of the warrant in the Court of Appeals, the petitioners are in a poor position to put that court into error for con-

sidering it. Again, however, since Mr. Sherk's knowledge and, hence, his showing of probable cause, were based primarily on what he learned from listening to the tape recordings a few days after thay had been seized by the state officers and before the initial suppression order of the District Court for Multnomah County (see pp. 2-4, *supra*), the question as to the validity of the federal warrant (which the petitioners now seemingly seek to avoid) and the question urged by the petitioners as to the propriety of the Court of Appeals' action in considering and sustaining its validity, are interrelated with the other issues involved in this case. Accordingly, we also do not oppose certiorari on this final issue tendered by the petitioners, which inevitably involves, in our view, the admissibility of the disputed evidence on the basis of the federal warrant.

Respectfully submitted.

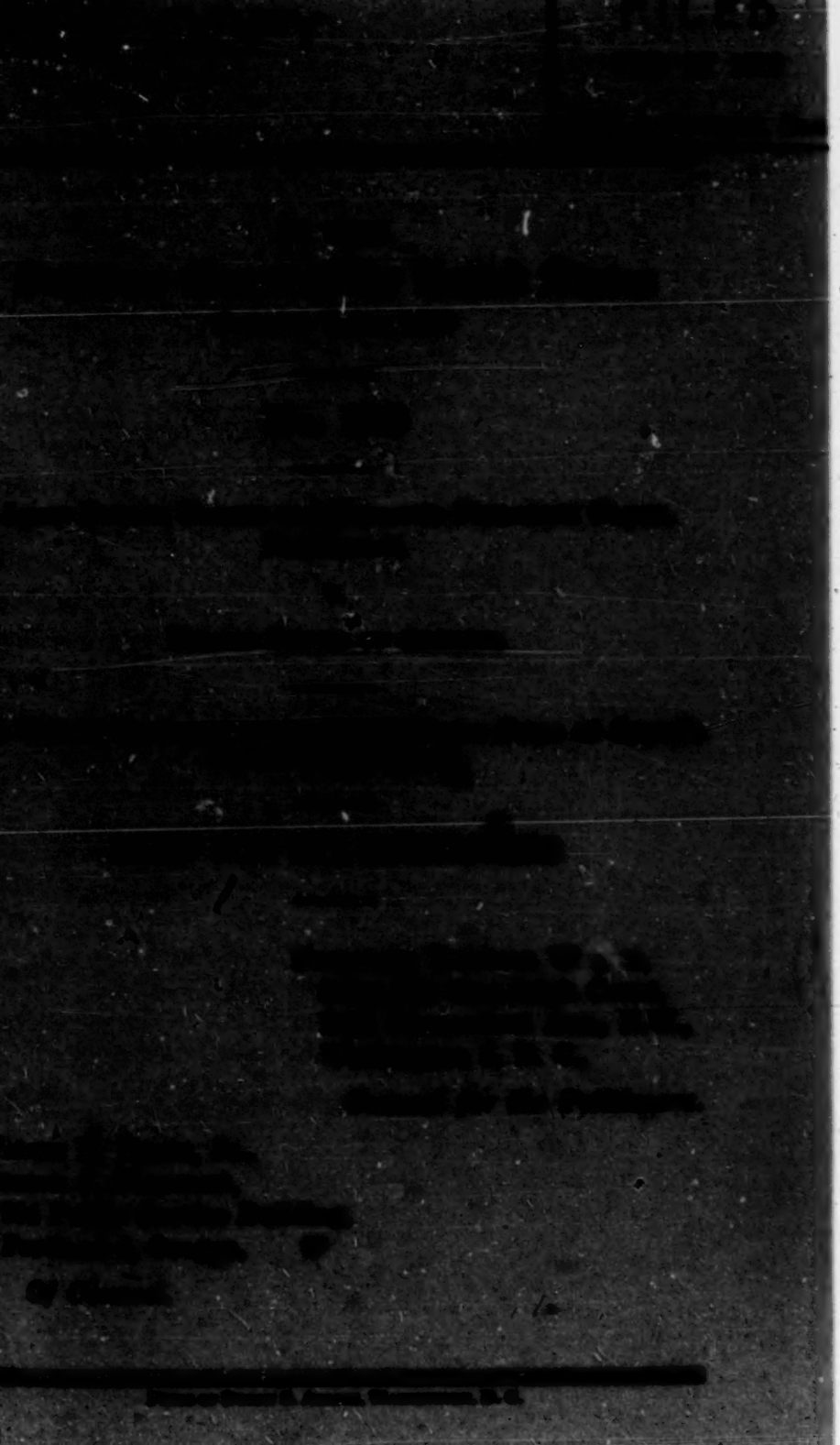
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JULY 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Petitioners,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Ninth Circuit. The opinion of the court below in this case (R. 449-459) is reported at 266 F. 2d 588.

The opinion of the court below denying petitioners' application for a stay to enable the filing of a petition for a writ of prohibition (R. 304-306) was not reported.

The opinion of the court below denying the petitioner Clark leave to appeal *in forma pauperis* is reported at 250 F. 2d 145.

District Court. The oral opinion of the district court denying petitioners' motion to suppress (R. 278-286) was not reported.

State Courts. The opinion of the Circuit Court of the State of Oregon for Multnomah County, rendered in connection with the injunction forbidding State and County officers to testify in the United States District Court in the present case (R. 295-301), was not reported.

JURISDICTION

The judgment of the court below (R. 460) was entered on April 27, 1959. A timely petition for rehearing was denied on May 28, 1959, the day after its filing (R. 460-461). The petition for certiorari was filed on June 19, 1959, and granted on October 12, 1959 (R. 461). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS INVOLVED

1. Whether the evidence used against petitioners in the Federal prosecution was obtained in violation of their rights under the Constitution of the United States.

2. Whether, if the evidence was unlawfully obtained, it was admissible in the Federal prosecution of petitioners because obtained by State officers without Federal participation.

3. Whether, after a State court has suppressed evidence that it held to be illegally seized as a matter of State law and has enjoined State and County officials from testifying concerning such evidence, a Federal conviction may thereafter be had and affirmed, where the Federal court did not undertake any independent examination of the original State seizure but assumed that it was illegal as a matter of State law and proceeded on the basis of (a) the testimony of the State officers, who were directed by the Federal court to testify notwithstanding the State court injunction, and of (b) the suppressed evidence, which was subsequently

aken from the constructive custody of the State court nder a Federal search warrant, on the footing that *Lea* v. *United States*, 350 U. S. 214, involves an application f the Supremacy Clause rather than a doctrine of eciprocity and of comity between State and Federal ourts.

4. Whether, where a motion to suppress evidence under riminal Rule 41(e) is based on the ground, *inter alia*, of he insufficiency of the affidavit on which the Federal search arrant was issued, and the District Court denies the otion on the expressed ground that the validity of that arrant is immaterial, and then cuts off proof as to whether he affidavit made a sufficient showing of probable cause, is open to the Court of Appeals to affirm the ruling enying the motion on the ground that the Federal search arrant was valid.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE OF COURT INVOLVED

The constitutional provisions, statutes, and rule of court nvolved are set forth in the Appendix below, pp. 105-111.

STATEMENT

As in the Petition for Certiorari, this Statement is estricted to the facts bearing on the questions presented, ll of which deal with searches and seizures.

A. The initial seizure and the original State proceedings through the granting of both motions to suppress.

On the afternoon of May 17, 1956, after allegedly listening n an extension line to a telephone conversation between ne Brad Williams, a newspaper reporter, and Chief of olice Ellsworth Herder of St. Helens, Oregon, William M. angley, then District Attorney of Multnomah County, regon, executed an affidavit on information and belief R. 53, 55-59, 61). That affidavit read in pertinent part follows (R. 20-21):

"I, William M. Langley, being first duly sworn, upon oath, depose and say, upon information and belief that there is in the possession of Raymond Clark in a certain building situated on premises occupied by and under the control of the said Raymond Clark at or about 2409 S. E. Main Street, in the City of Portland, County of Multnomah, State of Oregon, certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to exhibit said photographs.

"I further depose and say that the said Raymond Clark is in possession of the aforesaid obscene and indecent photographs with accompanying sound recordings with intent to use in violation of O.R.S. 167.150, i.e., possession of obscene pictures with intent to exhibit them.

"I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon."

The Raymond Clark therein mentioned is one of the present petitioners, and he is, admittedly, an employee of the petitioner Elkins.

Chief Herder denied having had any telephone conversation with Brad Williams on the afternoon of May 17, 1956 (R. 78-79). He said he had talked to Williams on the telephone one evening the week before (R. 73, 76), in which he passed on, as hearsay, information concerning Clark's supposed possession of obscene pictures (R. 77-79). Chief Herder denied having talked to Langley (R. 77), denied knowing Clark (R. 78), and stated that he had no personal knowledge of any obscene pictures in Clark's possession at the address stated in Langley's affidavit (R. 77).

Williams was not called as a witness.

At about 5 P.M. (R. 411), Langley's affidavit was taken before the Hon. John R. Mears, Presiding Judge of the

District Court of the State of Oregon for Multnomah County, who, after examining the paper, somewhat perfunctorily according to his own later statement (R. 411), issued a search warrant (R. 404-405) authorizing the search of Clark's home "for obscene photographs and sound recordings."

Sheriff Schrunk of Multnomah County received the warrant around 6 P.M. (R. 82-83), but it was not actually executed until between 8:30 and 11:30 that evening (R. 406, 408), by Deputy Sheriff Minielly.

At that time, accompanied by three uniformed officers (R. 240-241), a newspaper photographer, and two reporters, Brad Williams being one of the latter (R. 241), Minielly went to the petitioner Clark's dwelling house, and held up the warrant at the door so that Mrs. Clark could read it through the glass (R. 242-243). When she refused admission and said the officers would have to wait until her husband came home in 15 or 20 minutes (R. 243), Sheriff Minielly and Officer Heem broke down the front door and entered (R. 240).

An extensive search followed, over a two-hour period (R. 244). Doug Baker, the other newspaper reporter, pointed to a hassock (R. 249), inside which Minielly found five cardboard boxes that contained the five rolls of electronic tape now in question (R. 245-247). A note was found in each box (R. 249). Minielly took the tapes into the basement where he examined them (R. 251-252). Thereafter he carried them into his car; this was about 15 minutes after the time they were found (R. 253). Then he turned them over to Sheriff Schrunk at the courthouse (R. 253).

Minielly made a return on the search warrant stating that "I found upon the said premises pursuant to said warrant no obscene and indecent photographs with accompanying sound recordings" (R. 406), and he so

testified (R. 244, 249, 259). There were found some 24 "party records" (R. 86-87, 249, 407, 408), the precise nature of which does not appear.

Minielly and his men did however seize 26 slot machines (R. 407, 408), many spools of wire recordings, several reels of film, a projector, an amplifier, a payroll book, and numerous other items (R. 407, 408). Minielly's receipt stated that "I observed evidence of the crime of wire-tapping" (R. 407), but on the stand he admitted that he was unable to tell what if anything the tapes contained (R. 247, 250) or whether they contained intercepted telephone conversations (R. 248), and that there was no evidence to show that any of the seized articles were being used in the commission of any crime (R. 259-260).

Minielly turned the tapes over to Schrunk at the courthouse downtown (R. 87, 253) at about 1 A.M. on May 18 (R. 89). Reporter Brad Williams was there (R. 89-90), reporter Doug Baker and night editor Bob Stein came later (R. 91, 168). Also present was a radio technician, Charles Moore, who was in the employ of that same newspaper's affiliated radio station (R. 166-168).

Moore had two tape-recording machines and several rolls of blank recording tape (R. 169), and then made copies of the tapes that had been seized by Minielly (R. 98, 170-172), copying the portions that Brad Williams indicated (R. 172). One of the reporters took the copies away (R. 173). All this took place in Sheriff Schrunk's office in the courthouse with Schrunk and his deputy Minielly present (R. 168, 169, 173, 254).

Novak, another technician from the same radio station, testified to substantially the same transactions (R. 229-234), but placed the occurrence in the early morning hours of the next day (R. 229). Sheriff Schrunk, however, testified that Novak was among those present early in the morning of the 18th (R. 90-91).

That day, Friday, May 18, 1956, was primary election day in Oregon. O.R.S. 249.340. It was accordingly both a legal (O.R.S. 187.020(3)) as well as a judicial (O.R.S. 1.060) holiday. The courts were also closed on Saturday and Sunday, May 19 and 20, 1956 (R. 63).

On Monday, May 21, 1956, the first judicial day following the seizure (R. 289-290), the petitioner Clark filed, in the State District Court that had issued the search warrant, a motion to suppress the seized evidence, and to return or destroy the property (R. 21, 410). After hearing testimony, Judge Mears granted the motion to suppress, on the ground that the affidavit on which the warrant was issued was faulty, in that it was made only on information and belief (R. 24, 411-413).

In connection with his granting of the motion to suppress, Judge Mears said (R. 411-412):

> "I glanced over the affidavit; and I say 'glanced'; I did not study it because I had relied on the integrity and ability of the District Attorney. After it was sworn to I signed the search warrant and the proceedings that happened thereafter have been laid out at length in this Court.
>
> "I feel, gentlemen, that I was misled in signing the search warrant. I was perhaps in error in not meticulously examining the law and the District Attorney, but I relied upon the legal ability of the gentlemen present and did sign the search warrant. I can see that the search warrant has no greater power than the affidavit which stands behind it. I can see no further reason for continuing a hearing of this case because we always will have to go back to the affidavit, which is the original, the starting, document which I now find under the state law to be faulty."

The slot machines were ordered destroyed, as contraband (R. 24, 412, 414), while the remaining property was ordered impounded in the possession of the Sheriff of Multnomah County, to be held at and released only upon

the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard" (R. 24; see also R. 412, 414).

Pursuant to this order, the five reels of tape recordings were, on May 28, 1956, turned over to the Attorney General of the State of Oregon (R. 266, 409), and on June 4 they were placed in a safe deposit box in the First State Bank of Milwaukie that had been rented to the Oregon State Police (R. 108, 266).

Meanwhile, during the pendency of the hearing on the motion to dismiss in the State District Court, on May 21-24 (R. 21, 23, 410), these occurrences took place:

(a) The text of the conversations recorded on the seized tapes was published by the newspaper that had caused the copies to be made in the early morning hours immediately after the seizure (R. 217).

(b) On May 22, one of the five seized tapes was played back in Sheriff Schrunk's office to Ronald E. Sherk, an F.B.I. agent (R. 1, 122-126), who had been sent there at the direction of his superior, Special Agent in Charge Santoiana (R. 125-126, 276). This performance was cut short because Sherk was told by Deputy Sheriff Minielly that the Grand Jury for Multnomah County, Oregon, wanted the tapes (R. 133-134).

(c) On the same day, May 22, 1956, the Grand Jury for Multnomah County, Oregon, indicted petitioners Elkins and Clark for the offense of intercepting and obtaining telecommunications in violation of Chapter 675 of the Laws of Oregon, 1955 (*infra*, pages 108-109); see R. 17, 26, 27, 290, 427.

The record indicates that the District Attorney of Multnomah County challenged the jurisdiction of the State District Court (Mears, J.) to order suppression of the evidence once an indictment had been returned (R. 215);

see also 7 Tr. 1168-1169, 1175-1176, 1184-1187; 8 Tr. 1296-1297.[1] The State District Attorney also argued in the State District Court that that court lacked power to suppress the seized evidence because it constituted a violation of § 605 of the Federal Communications Act (R. 213).[2]

At any rate, the matter of the suppression of the evidence in question was reargued by the petitioners before the State Circuit Court (R. 290, 428)—a court of general criminal jurisdiction, see *In re Application of Loundagin*, 129 Ore. 652, 278 Pac. 950, and authorities there cited—and that court (Lonergan, P. J.) on September 17, 1956, also ordered the evidence suppressed, and also directed that the seized articles "be turned over to the Attorney General to be disposed of according to the law and by the order of this Court" (R. 25-28).

B. The Federal prosecution and the Federal motion to suppress.

Late in July 1956, while the tapes in question were in the bank in Milwaukie pursuant to the order of the State District Court, the United States Attorney for the District of Oregon ascertained from Captain Gurdane of the Oregon State Police (R. 392) that they were still being held there for the Attorney General of Oregon (R. 238-239).

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[1] References to "Tr." are to portions of the fifteen volumes of testimony taken at petitioners' trial that remain unprinted.

[2] In Def. Ex. 12, not printed, entitled "Answer to Motion to Suppress and Return or Destroy Evidence," District Attorney Langley, by his Deputy Oscar D. Howlett, said:

> "4. That the aforesaid wiretapping equipment and recordings of intercepted telephone conversations are evidence of violation of Section 605 of the Federal Communications Act, and the District Court, Multnomah County lacks power to suppress, return, or destroy evidence of a Federal crime, and any action by any person in doing so makes such person guilty of being an accessory after the fact—itself a Federal crime."

On August 13, 1956, F.B.I. Agent Sherk visited the First State Bank of Milwaukie with Captain Gurdane and Lieut. Cross of the Oregon State Police (R. 155, 174-175), and saw all five tapes in their cardboard containers, then watched all five being replaced in the safe deposit box (R. 177-178, 184-187, 267). On this occasion, Sherk did not hear any of the tapes played (R. 178).

Thereafter, on September 5, 1956, Sherk executed an affidavit for a search warrant in which he said (R. 1):

> "that heretofore, on May 22, 1956, in the State and District of Oregon, I listened to portions of electronic tape recordings of conversations, which recordings contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, Section 605, U.S.C.A. I am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one Minifon recording machine and four spools of Minifon recording machine wire, which said properties containing evidence of such recorded intercepted telephone conversations are located in Safety Deposit Box 912 at The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive they are so situated."

The United States Commissioner accordingly issued a search warrant (R. 2), which Sherk executed in the presence of Captain Gurdane of the Oregon State Police and F.B.I. Agent Dunn (R. 114, 187) and pursuant to which he took the five tape recordings, one Minifon recording machine, and three spools of Minifon recording machine wire (R. 3, 116-117, 190, 202, 270).

Not until after this seizure did Sherk hear the balance of the tapes played (R. 142-143), or learn that the communications recorded thereon had been intercepted with-

out the consent of the sender (R. 157-158, 190-191), or hear any of the seized spools played (R. 123, 153, 154, 190).

Thereafter, later in September 1956, District Attorney Langley of Multnomah County joined in petitioners' motion to dismiss the State wire-tapping indictment against them, on the ground that, since the State Attorney General had conceded the illegality of the original seizure, the only successful prosecution that could be successfully had was the Federal one, and that dismissal of the State indictment would facilitate the Federal prosecution (R. 224-226).[3]

On February 4, 1957, the present nine count Federal indictment followed (R. 4-11).

Count I (R. 4-7) charged a conspiracy, in violation of 18 U.S.C. § 371 "to intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications," in violation of 47 U.S.C. §§ 501 and 605 (*infra*, pp. 106-107).

Counts II to IX, inclusive, alleged substantive violations of 47 U.S.C. §§ 501 and 605, each count naming different

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[3] See Def. Ex. 13, not printed, "Reply to Motion of Defendants for Dismissal of Indictment":

> "That the United States Government on September 5, 1956 seized the said evidence for prosecution by the United States Government; that the dismissal of the within indictment will facilitate the prosecution by the government of the United States."

This document was signed in District Attorney Langley's name by his deputy Howard Lonergan. It was dated September 11, 1956, but was not filed until September 25, 1956. The State indictment against petitioners was however not dismissed until March 13, 1958, long after the Federal trial, but before the appeal was finally docketed in the Court of Appeals. See 250 F. 2d 145 and unprinted United States District Court docket entries.

persons as parties to the allegedly intercepted conversations, and different persons to whom the conservations were allegedly disclosed (R. 7-11).

Thereafter, pursuant to Rule 41(e), F. R. Crim. P. (*infra*, page 111), petitioners moved in the United States District Court to suppress as evidence the property seized by Sherk, "of which the defendants herein are the owners" (R. 13). The motion to suppress (R. 13-15) set forth five grounds:

First (R. 14), that the State search warrant under which the property was originally seized by State officers had been declared illegal by the Oregon courts, and that accordingly such property could not be used in the present proceeding.

Second (R. 14), that the Federal search warrant was illegal and void "in that it is and was based upon an insufficient affidavit," so that there was no probable cause for its issuance.

Third (R. 14), that the illegality of the original State seizure rendered the evidence illegal "regardless of the manner in which the Federal authorities later obtained the same."

Fourth (R. 14-15), that the State and County officers made the unlawful search and seizure "solely for the purpose of permitting and encouraging a prosecution in the Federal Courts for the commission of a crime against the United States."

Fifth (R. 15), that the property seized was in the custody of the Oregon State courts at the time, and that the United States District Court had no jurisdiction to seize it.

The foregoing motion to suppress was supported by an affidavit and numerous exhibits (R. 16-28) that set forth the State and Federal proceedings already set forth.

Four days of hearings on this motion followed (R. 52-286), during which all the circumstances surrounding the original seizure and the execution of both the State and Federal search warrants, which are detailed *supra*, pp. 3-11, were developed. The following matters transpired during the hearings:

1. Following the testimony of Police Chief Herder (who testified that any information he gave concerning the petitioner Clark was hearsay and stated by him to be such, *supra*, p. 4), the following colloquy took place (R. 79-80):

> "The Court: Mr. Luckey, I wonder if you can advise me, does the Government concede that the search and seizure had by the State officials, the Sheriff of Multnomah County, the original seizure of these articles now sought to be suppressed, whether or not that was an illegal search and seizure? Have you taken any position about it that is binding on this Court?
>
> "Mr. Luckey [U. S. Attorney]: On that matter, Your Honor, I would suggest that the position of the Government would be that it is immaterial whether or not it was illegal. And, we wouldn't feel that it was incumbent upon us to establish the legality of that search and seizure.
>
> "On the other hand, we would not desire to redress the State processes and mark it as illegal in our view. It is a litigious question and one that we do not believe is before the Court except on, possibly, a theory of continued gain through cooperation which we believe the evidence will show is not the case here.
>
> "The Court: Well, I was just wondering how far we should go into this matter of the State seizure.
>
> "Mr. Luckey: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal."

2. With respect to the alleged participation of the Federal officers in the original search, there was no evidence

of such participation and no evidence that any Federal officers had advance knowledge of the impending raid (R. 69-70, 79, 103-104, 204, 228, 261, 263, 269, 284), although there was uncontradicted testimony from many sources that two-way cooperation between State and Federal law enforcement agencies was the normal and usual practice (R. 100-103, 105-106, 117-119, 203-204, 262, 268).

3. While counsel for the petitioners was endeavoring to establish that Agent Sherk had insufficient personal knowledge on which to base a valid affidavit as a predicate for seizure of all the tapes, inasmuch as prior to its date he had only heard part of a single tape played (R. 123, 132-134, 143, 147-148, 191, 194), the United States Attorney objected on grounds of relevancy, on the footing that the "silver platter" doctrine (R. 195) rendered the legality or illegality of the Federal search warrant quite immaterial (R. 195-197). A lengthy colloquy followed, at the close of which the court said (R. 200-201):

> "The Court: * * * I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal it has to be upon some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.
>
> * * * * * *
>
> I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not. His right of possession must be based upon some other ground than that of a valid search warrant in his possession.
>
> * * * * * *
>
> "Mr. Crawford [counsel for petitioners on the motion]: I will have to state sincerely to Your Honor that I was trying to understand the effect of Your

Honor's ruling and what it would prevent me from attempting to do.

"The Court: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge —the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.

"Mr. Crawford: Will the Government admit the invalidity of the search warrant?

"The Court: No. The Government merely says that it does not make any difference whether it is invalid or valid. So, the Court will accept that theory. From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk."

4. While counsel for petitioners was testing Agent Sherk's ability to identify the tapes he seized under the search warrant on September 5 as the same he had seen in the Sheriff's office on May 22, the United States Attorney objected that, in order to have any standing under their motion, petitioners were required to admit that identity (R. 181-182). The following colloquy then took place (R. 182):

"The Court: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?

"Mr. Crawford: That's right.

"The Court: Taken under the State's warrant. You don't repudiate that, do you?

"Mr. Crawford: No.

"The Court: Yes."

5. Immediately after the close of the four-day hearing, the trial judge (East, D.J.) delivered an oral opinion

denying the motion (R. 278-286), the gist of which was that, under the rule of *Lustig* v. *United States*, 338 U.S. 74, the illegality of the original seizure did not vitiate and taint the evidence forevermore. The following additional points were touched on in the course of the ruling:

(a) The trial judge made a finding of fact that there was no Federal participation in the original seizure, that no Federal officer had any advance notice thereof (R. 284), and that the sole purpose of the original seizure was a State prosecution (R. 284-285).

(b) The trial judge restated his earlier position regarding the immateriality of the Federal search warrant, saying (R. 278-279):

> "Now, for the reasons that were expressed the other day, this Court does not deem it necessary to decide that issue in order to determine whether or not the articles moved against are within the legal possession of this court now. Therefore, the Court will make no finding as to whether or not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal upon its face. Nor will this Court determine that the search and the seizure made by the special agent Sherk, as he said, in the belief that he was armed with a legal search warrant was in fact a legal exercise of search and seizure under such warrant."

C. State court injunction against State officers.

Judge East announced his ruling on April 12, 1957: On the day following (R. 291), petitioners brought suit in the Circuit Court of the State of Oregon for Multnomah County, seeking a temporary restraining order to forbid the State District Attorney [Langley] and named deputies [Lonergan, Howlett], the Sheriff of Multnomah County [Schrunk] and named deputies [Minielly, Lynn, Stack-

house, Sacanti, Heem], named State Policemen [Maison, Gurdane, Cross], the State Attorney General [Thornton],[4] and "other State or County officials unknown to plaintiffs" from testifying concerning any facts learned in or as a result of the original State search and seizure which two Oregon courts had successively held to be illegal (R. 290). Following a hearing (R. 302), the State Circuit Court (Redding, J.) issued the restraining order as prayed for (R. 301-304), and wrote an opinion (R. 295-301), the substance of which was that the restraining order was warranted by the doctrine of *Rea* v. *United States*, 350 U.S. 214. The terms of the restraining order then issued were repeated in a preliminary injunction on April 19, 1956 (R. 423), which has remained in effect ever since.

D. Application to Ninth Circuit for writ of prohibition.

When, at the commencement of the Federal trial, on April 16, the State restraining order just mentioned was shown to the United States District Judge, the latter stated (R. 309) that "I have reached this firm conclusion that the order just read so far as it attempts to interfere with the process of this Court here before issue is void and is a nullity and of no force and effect."

Accordingly, petitioners made telegraphic application to the United States Court of Appeals for the Ninth Circuit for a three-day stay of the pending trial, to enable them to petition for a writ of probibition forbidding the United States District Judge from compelling the giving of testimony or the production of evidence by the officials of the County of Multnomah and of the State of Oregon named in the State Circuit Court restraining order (R. 286-294). This application was presented orally in San Francisco on April 22, 1957, the trial in Portland being suspended on that day (R. 347-351, 353-354).

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[4] For the identification of individuals not previously mentioned, see ¶ 1 of the complaint in the State Circuit Court, R. 425.

The Ninth Circuit denied the application for a stay (R. 304-306), on the ground that a writ of prohibition could not be issued (R. 306), essentially because the Court of Appeals was of the view that the doctrine of *Rea* v. *United States*, 350 U.S. 214, was not one of comity (R. 305-306). The Ninth Circuit said (R. 306) that petitioners' "right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence." The *Per Curiam* opinion then handed down (R. 304-306) has never been reported.

E. Petitioners' trial in United States District Court.

As has been indicated, petitioners' trial began on April 16, 1957, and it continued (except for the adjournment on April 22 to permit the foregoing application to be presented to the Court of Appeals) for some four weeks (R. 306), including Saturday (April 20 and 27, May 4 and 11; see R. 306) and night sessions.[5]

1. Inasmuch as no question is now presented concerning the validity of the indictment or the sufficiency (as distinguished from the legality) of the evidence, it is only necessary to refer to two incidents occurring at the trial:

First, the five reels of tape recordings which petitioners had moved to suppress (R. 13-15) were admitted into evidence over their objections (Govt. Ex. 1, R. 324, 346; Govt. Ex. 2, R. 325, 353; Govt. Ex. 3, R. 326, 357; Govt. Ex. 4, R. 326-327, 359-360; Govt. Ex. 5, R. 331-332, 361; see also, as to all, R. 399-400).[6]

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[5] There were four night sessions, as follows: April 18, 7:30 P.M. to 11:45 P.M. (1 Tr. 119, 128); April 30, 7:10 P.M. to 9:00 P.M. (7 Tr. 1145, 1210); May 2, 7:00 P.M. to 9:00 P.M. (9 Tr. 1524, 1591); May 7, 7:00 P.M. to 8:30 P.M. (13 Tr. 2205, 2261).

[6] Each reel was also accompanied by containers and slips, which were given sub-numbers, and were likewise admitted (see references in text, also R. 373). Certain of the slips were photographically enlarged to facilitate proof of handwriting, were given exhibit numbers suffixed by Z, and were similarly admitted over objection. 7 Tr. 1044-1045, 1052.

Second, eight officers of the State of Oregon and of its political subdivision Multnomah County, seven of whom had been enjoined by name by the State Circuit Court from testifying concerning, *inter alia*, copies or transcripts of the tape recordings illegally seized by State officers on May 17, 1956, and thereafter ordered suppressed by two Oregon courts, were, notwithstanding the State Circuit Court's restraining order, directed by the United States District Judge to testify, over petitioners' objections:

(1) George Minielly, Deputy Sheriff of Multnomah County (R. 362-367).

Minielly had been subpoenaed by petitioners on April 9 in connection with their motion to suppress (R. 51). When he completed his testimony he was kept under subpoena at the request of petitioners' counsel,[7] but was not thereafter recalled.

Thereafter Minielly was subpoenaed as a Government witness for the trial; subpoena dated 11 April and served 12 April (R. 415).

(2) Terry D. Schrunk, Sheriff of Multnomah County at the time of the illegal seizure (R. 368-372).

He was subpoenaed by the petitioners in connection with their motion to suppress, and was not excused (1 MS 131-132), although never recalled.

Thereafter he was subpoenaed by the Government for the trial on April 11, under a subpoena that was not served until April 15 (R. 415-416).

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[7] "The Court: Are all parties concluded with this witness?

"Mr. Crawford: May we keep him under subpoena with the understanding that he will respond upon reasonable notice to a telephone call?

"The Witness: Yes, sir.

"The Court: Let the record so show." 2 MS 434.

(As in the Petition for Certiorari, "MS" refers to the unprinted portion of the transcript of proceedings on the Federal motion to suppress.)

(3) Oscar D. Howlett, Deputy District Attorney of Multnomah County (R. 373-377).

Howlett was subpoenaed by petitioners on April 9 in connection with the motion to suppress (R. 51), and was excused after testifying (2 MS 360).[8]

Thereafter, on April 29, he was subpoenaed by the Government for the trial (R. 416-417).

(4) Howard R. Lonergan, Deputy District Attorney of Multnomah County (R. 377-386).

Lonergan was subpoenaed by petitioners in connection with the motion to suppress, was held under subpoena after testifying (2 MS 376-377), but was not recalled.

The State proceeding against him seeking to enjoin him from testifying was dismissed on his representation that he had not been subpoenaed for the Federal trial (R. 302, 377-378, 383-384). Petitioners' trial counsel sought a stay from the Federal court in order that he might again be joined in the State proceeding (R. 384-385), but the ruling directing him to testify assumed that he was a party (R. 385).

Lonergan appeared at the trial pursuant to a Government subpoena dated and served on April 29 (R. 417-418).

(5) Claude F. Cross, Lieutenant of the Oregon State Police (R. 386, 388-391).

Cross was subpoenaed by petitioners in connection with the motion to suppress, was not excused (2 MS 445), but was not recalled.

He appeared at the trial pursuant to a Government subpoena dated April 11 and served April 12 (R. 418-419).

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[8] "Mr. Crawford: Your Honor, Mr. Howlett may be excused, as far as I'm concerned.

"Mr. Luckey: No objection.

"The Court: He may be excused."

(6) Vayne M. Gurdane, Captain of the Oregon State Police (R. 392-394).

Gurdane was subpoenaed by petitioners in connection with the motion to suppress, was excused by the court but agreed to respond again if telephoned (2 MS 395), and was in fact recalled (R. 269-271).

He appeared at the trial pursuant to a Government subpoena dated April 11 and served on April 12 (R. 418-419).

(7) William M. Langley, District Attorney of Multnomah County (R. 396-397).

Langley was subpoenaed by petitioners in connection with the motion to suppress, was excused after testifying with the understanding that he was still subject to the subpoena on reasonable notice (1 MS 69), but was not recalled.

He appeared at the trial pursuant to a Government subpoena dated April 11 and served on April 12 (R. 421-422).

(8) James C. Darby, sergeant of the Oregon State Police (R. 394-396).

Darby was not subpoenaed for the motion to suppress. He was not specifically named in the State restraining order, but recognized that he was included within the category of "other State or County officials" (R. 395).

He appeared at the trial pursuant to a Government subpoena dated and served on May 1 (R. 419-420).

After being ordered to do so by the court, all of these eight witnesses then testified at length.

While, as has been indicated, the sufficiency of the evidence on the counts that went to the jury is not now in issue, petitioners do not understand that the Government contends that there would be any case against them if their

motion to suppress the five reels of tape recordings had been granted, or if the United States District Judge had not directed the eight above-named State and County officials to testify in violation of the State restraining order.

2. At the close of the prosecution's case, the trial judge dismissed Counts III and IV of the indictment and overt acts 1 and 2 of Count I (R. 400). In all other respects, petitioners' motions for acquittal were denied (Docket entries, May 9 and 10; not printed).

The remaining counts were submitted to the jury, which on May 11, 1957, found both petitioners guilty on all of them (Docket entry, May 11; not printed), after deliberating for 3 hours and 20 minutes (Minute entry, May 11; not printed).

Motions for a new trial and in arrest of judgment, filed by both petitioners, were denied (Docket and Minute Entries, June 17, 1957; not printed). The motion for a new trial (R. 28-30) urged that the tape recordings (Govt. Ex. 1-5) should have been excluded (¶ VIII, R. 28-29), and that the State officers enjoined by the Oregon State courts from testifying should not have been directed by the Federal court to testify in violation of the State restraining order (¶¶ IX, XV; R. 29-30)

3. Petitioner Elkins was sentenced to be imprisoned for ten months and to pay a fine of $1,000 on Count I; to be imprisoned for ten months and to pay a fine of $1,000 on Count II; to be imprisoned for six months on each of Counts V to IX; the periods of ten months each to run consecutively; the periods of six months each to run concurrently with each other and with the second period of ten months (R. 31-32). Hence, petitioner Elkins' sentence was twenty months' confinement and a total fine of $2,000.

Petitioner Clark was sentenced to be imprisoned for four months and to pay a fine of $250 on Count I; to be

imprisoned for 60 days and to pay a fine of $250 on Count II; to be imprisoned for 60 days on each of Counts V to IX; the period of four months and the first period of 60 days to run consecutively; the remaining periods of 60 days each to run concurrently with each other and with the first period of 60 days. (R. 33-34). Hence, petitioner Clark's sentence was nearly six months' confinement (four months plus 60 days) and a total fine of $500.

By supplemental judgments, each petitioner was made liable for the Government's taxable costs (R. 41-42).

Each petitioner filed timely notices of appeal as to each judgment (R. 35-41, 43-48).

F. State contempt proceedings after conclusion of Federal trial; the Federal injunction.

Following the close of the evidence in the Federal trial, both petitioners moved in the Circuit Court of the State of Oregon for Multnomah County for an order adjudging in contempt the seven State and County officials who by testifying at the Federal trial had violated that court's restraining order, in which they were specifically named (R. 433-438).[9] This motion was made returnable on May 24 (R. 433).

The United States countered by seeking and obtaining from the United States District Court on the day before —May 23—an *ex parte* temporary restraining order forbidding petitioners from proceeding further with the contempt proceedings (R. 422-441 [complaint]; R. 441-445 [temporary restraining order]). Both the complaint of the United States (¶ IV, R. 433) and the findings in the temporary restraining order (¶ IV, R. 442) stated that the Federal subpoenas were issued after the State order that prohibited the seven named witnesses from testifying. As has been shown, pp. 19-21, *supra*, this was true only in part.

[9] The witness Darby, see p. 21, *supra*, was not included; see R. 434.

The foregoing Federal restraining order was, by its terms, in force for only 10 days (R. 445). On May 31, 1957, it was extended for an additional 10 days (R. 446), and petitioners were directed to show cause why a preliminary injunction should not issue (R. 446-447). On June 10, the temporary restraining order was continued "until October 7, 1957, or, until further application is made by either party prior thereto" (R. 448).

G. The decision of the court below.

On appeal, the Ninth Circuit affirmed (R. 449-460). Apart from rulings on questions not presented here, and numerous animadversions directed at alleged procedural irregularities on the part of petitioners and their trial counsel, the grounds of decision here material may be summarized as follows:

1. The court below held that the lawfulness of the State search and seizure need not be considered, because the record failed to show Federal participation therein. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized" (R. 456), citing *inter alia* its decision in *Rios* v. *United States*, 256 F. 2d 173 (C.A. 9), in which certiorari had been granted the week before (359 U.S. 965), and which is now here as No. 52 of the present Term.

2. The court below held that there was no merit in petitioners' Specification 12, which challenged the District Court's compelling the testimony of the State and County officials enjoined by the Oregon State court (R. 458).[10]

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[10] As set forth in petitioners' brief in the C.A. 9 at p. 114, this read:

> "Specification of Error No. 12. The Court below erred in compelling Government witnesses Minielly, Schrunk, Howlett, Lonergan, Cross, Gurdane, Darby and Langley to testify in violation of the State court restraining order."

3. The court below considered and rejected petitioners' contention that the Federal search and seizure was unlawful, holding that the Federal search warrant had been issued in full conformity with Federal law (R. 456).

Notwithstanding the foregoing square holdings, there were alternative holdings, which are mentioned in the interests of completeness.

4. In connection with petitioners' contention that the District Court should not have required the State and County officials to testify in violation of the State restraining order, the court below said (R. 458) that Specification of Error 12 (quoted in note 10, *supra*), which related "to the admission of evidence at the trial" did not, "as required by our Rule 18 [set forth at R. 452, note 8], quote the grounds for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 * * *." The court below then went on to say (R. 458), "However, we have considered them and find no merit in them."

5. The court below said (R. 457) that the motion for suppression of evidence (R. 13-15) was not "based on any of the five grounds specified in subdivision (e) of Rule 41."

6. The court below said (R. 457) that "defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized." This conclusion was based on statements (R. 457) that the Federal search and seizure were made at the First State Bank of Milwaukie and not at "any house or place owned, occupied or used by defendants or either of them"; and that the motion to suppress did not say, nor did the record show, that "defendants or either of them owned or had any proprietary interest in the property seized."

"Hence"—said the court below (R. 457-458)—"we are not required to consider defendants' contention that the

Federal search and seizure were unlawful. However, we have considered it and find no merit in it."

A timely petition for rehearing was denied on the day after it was filed (R. 460-461), after which this Court granted certiorari (R. 461; 361 U.S. 810).

SUMMARY OF ARGUMENT

I. The evidence against petitioners was obtained in violation of their rights under the Constitution of the United States, because obtained through an unreasonable search and seizure.

A. The search was unreasonable because conducted pursuant to a search warrant issued on an affidavit that was made without probable cause. Langley, the affiant, had no personal knowledge, and executed his affidavit on information and belief. The source of his information was an intercepted telephone conversation between a newspaper reporter and Chief Herder; the latter's information was hearsay only and was by him stated to be hearsay. Consequently, since Langley's affidavit was based on multiple hearsay, it did not establish probable cause. The information Langley had was plainly insufficient to warrant stopping a moving automobile, much less to justify breaking into a dwelling house.

The consequent lack of probable cause is the same whether tested by the Fourth or the Fourteenth Amendments, by the Constitution of the United States or by that of the State of Oregon. Two Oregon courts held the search unlawful because undertaken pursuant to a warrant based on an insufficient affidavit. Consequently, seizure of property under the invalid warrant violated the Constitution of the United States.

B. The search was additionally unreasonable because the evidence seized consisted of non-contraband articles that were not named in the search warrant. That instru-

ment authorized a search for "obscene photographs and sound recordings"; none were found, but many other articles were taken. Some, like the slot machines, were contraband as a matter of State law and hence lawfully taken and destroyed. But the tape recordings now in question were not *per se* instrumentalities of crime and were not being used in the commission of a crime at the time of seizure. Consequently they were not subject to taking under the warrant. The search was a mere exploratory search for evidence.

C. An unreasonable search and seizure by State officers violates the Fourteenth Amendment, because freedom from unreasonable searches and seizures is a part of the concept of ordered liberty comprehended within Due Process of Law. *Wolf* v. *Colorado*, 338 U.S. 25. Accordingly a search and seizure which substantively violates the Fourth Amendment likewise violates the Fourteenth.

D. The prosecution and both courts below proceeded on the assumption that the evidence in question, which two State courts had successively ordered suppressed, had been illegally obtained. No effort was made at any stage to re-examine the State courts' holding. In a proper case re-examination by the Federal court would not be foreclosed, but on the present facts no contrary ruling could fairly have been anticipated in any forum.

II. Since the evidence was lawfully obtained, it was inadmissible in the present Federal prosecution regardless of the non-participation of Federal officers in the original search and seizure by State officers. The "silver platter" doctrine, which is to the contrary, rests on an assumption which this Court has since rejected, and has other demonstrable infirmities besides.

A. The evidence in question was also obtained in violation of State law; the original search violated the Constitution and statutes of Oregon, and may well have involved

the State misdemeanor of causing a search warrant to be issued maliciously and without probable cause.

B. Since the validity of the Federal search warrant was held to be immaterial and was not permitted to be litigated at the hearing on the motion to suppress, that warrant did not cure the unlawfulness of the original State seizure.

C. Those necessary preliminaries disposed of, petitioners proceed to demonstrate that the fruits of a State search and seizure which are unlawful under both State and Federal law are inadmissible in a Federal prosecution.

1. The assumption underlying the "silver platter" doctrine has since been rejected. The State seizure aspect of *Weeks* v. *United States*, 232 U.S. 383, 398, rested on the proposition that the Fourth Amendment did not apply to the States. But after *Wolf* v. *Colorado*, 338 U.S. 25, with its holding that the substance of the Fourth Amendment was included in the Due Process of Law of the Fourteenth Amendment, the doctrinal underpinning of the State seizure aspect of *Weeks* disappeared. *Cessante ratione legis, cessat ipsa lex.*

2. When the United States uses illegally obtained evidence, howsoever acquired, it ratifies and adopts the illegality with all of the taint thereunto appertaining. On that point it is submitted that the non-constitutional views of Holmes and Brandeis, JJ., in *Olmstead* v. *United States*, 277 U.S. 438, based on the violation of State law there involved, should now be adopted. "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously." 277 U.S. at 485.

3. When evidence unlawfully or criminally seized by State officers is used in a Federal prosecution to obtain a Federal conviction, such evidence has in fact been gathered on behalf of the United States, and must therefore be excluded. See *Gambino* v. *United States*, 275 U.S. 310, 316-317: "The prosecution thereupon instituted by the federal authorities

was, as conducted, in effect a ratification of the arrest, search and seizure made by the [State] troopers on behalf of the United States"—the precise situation here. It does not become the United States to step into the shoes of State officers who have violated the Constitution and laws of their own State as well as the Constitution of the United States.

4. When the United States uses in a criminal prosecution evidence that is obtained through an illegal search and seizure by persons other than Federal officers, it is giving enforcement to private or State action so as to transform the search and seizure into Federal action, just as, see *Shelley* v. *Kraemer*, 334 U.S. 1, a purely private agreement is transformed into State action when it is given enforcement by State courts. Here the use of the fruits of the State seizure—the very *corpus delicti* of the Federal offense—to deprive individuals of their liberty because of a violation of Federal law, constitutes Federal action, and hence is subject to all of the limitations of the Federal Constitution.

5. Federal constitutional interests are frustrated rather than furthered by the ruling below. Here (a) the evidence was inadmissible in a State prosecution because illegally seized. Moreover (b), it would have been equally inadmissible in a Federal prosecution if similarly seized by or on behalf of Federal officers. Next (c), if thus seized by Federal officers, they would not have been permitted to transfer the evidence to State officers for purposes of State prosecution. *Rea* v. *United States*, 350 U.S. 214. On what reasoning, therefore, should the same evidence be admissible in the present situation (d), simply because transferred from State to Federal custody rather than in the other direction? After all, here the State policy against unreasonable searches and seizures is identical with the Federal policy, and the substantive offenses involved are also the same. The answer is that no sound theory of law, of social interests, of federalism, or of constitutional inter-

pretation requires that, in this fourth instance alone, the illegally seized evidence should be admissible.

6. The present case graphically demonstrates that application of the "silver platter" doctrine results in "a disreputable collision of jurisdictions" (*Orton* v. *Smith*, 18 How. 263, 266). Here, although there is no conflict between State and Federal law and policy—for Oregon and the United States are as one in their condemnation of the use of illegally seized evidence—there were no less than five conflicts between State and Federal courts because of the "silver platter" doctrine: (i) Although two State courts had, on Federal standards, suppressed the evidence, the Federal court ordered it admitted. (ii) After denial of the Federal motion to suppress, the State court enjoined State and County officers from testifying in Federal court concerning the seizure, on the authority of *Rea* v. *United States*, 350 U.S. 214. (iii) Notwithstanding the State injunction, the Federal court directed each of the enjoined witnesses to testify. (iv) Petitioners accordingly moved to cite those witnesses for contempt. (v) The Federal court enjoined further prosecution of the State contempt proceedings.

Contrariwise, if there were no "silver platter" doctrine, the matter would have been over once the Federal prosecutor conceded, as he did here, the illegality of the original State seizure.

7. Thus the "silver platter" doctrine now has neither doctrinal nor practical support. It breeds opportunities for evasion—and sneakiness. It results in a selective enforcement of the Constitution, preferring the Fourth Amendment over the Fourteenth because of happenstance. It should accordingly "be allowed a deserved repose."

III. The rule of *Rea* v. *United States*, 350 U.S. 214, to the effect that a Federal court after suppressing evidence illegally seized should enjoin a Federal officer from there-

after testifying in a State prosecution concerning the seizure, is one of comity, and is applicable *in pari materia* to State suppression of evidence followed by a Federal prosecution based on the same evidence.

A. The incidents of a race of diligence are not here involved. The Federal subpoenas under which the State witnesses appeared at the hearing on the Federal motion to suppress lapsed once that motion was denied. Thereafter, three of the eight witnesses in question were restrained by the State court before being subpoenaed for the Federal trial. If the *Rea* doctrine is one of comity, the State order was good against all the witnesses, otherwise it was without effect against any. There cannot be one result for some of the witnesses and another for the others.

B. The *Rea* case rested, not on the Supremacy Clause, but on the proposition that a Federal court should by an *in personam* decree prevent Federal officers from flouting Federal policies. See 350 U.S. at 217-218, where the gist of the decision appears; nothing therein turns on the Supremacy Clause, which indeed is not mentioned anywhere in the opinion.

C. The present case is, in every significant respect, the precise converse of *Rea;* and indeed the State court relied on *Rea* in issuing its injunction. The seized property, which in *Rea* was subject to the orders of the Federal court by statute, was here subject to the orders of the State courts by the terms of the orders of suppression. Other alleged distinctions do not add up to a difference in substance, as will be seen if the heart of the *Rea* opinion, 350 U.S. at 217-218, is paraphrased with "state" substituted for "federal" and *vice versa*, and with "State constitutional provisions" substituted for "Federal Rules."

D. To read the *Rea* rule as one of supremacy would nullify rather than effectuate basic constitutional provisions. The Supremacy Clause comes into play only where

there is conflict between Federal and State law and policy. Here the Oregon policy against unreasonable searches and seizures and against the use of illegally seized matter in evidence is identical with that of the United States. There being no conflict, the problem is one of comity. Both here and in *Rea*, the order in question was an *in personam* restraint to redress an abuse of process; in neither case did the order interfere with a prosecution by the other sovereign. This is a distinction going back at least to *Ex parte Young*, 209 U.S. 123, 163. Nor was there any effort here to direct the restrained State officers to disobey the Federal subpoenas; they were restricted only as to particular testimony, and that restriction enforced basic and fundamental Federal policies, the Fourth Amendment, the Due Process Clause of the Fourteenth, and the *Weeks* rule. Oregon is a *Weeks*-rule State. The Oregon law and policy that both Federal courts below brushed aside were therefore consistent with and in furtherance of Federal policy. Accordingly, any reliance on the Supremacy Clause to support the rulings below would pervert that provision into an instrumentality for nullifying the deeply-imbedded Federal constitutional policy against unreasonable searches and seizures.

E. Since Oregon excludes illegally seized evidence while New Mexico—where the *Rea* case arose—admits it, the present case is even stronger than *Rea* for an injunction against testifying and using the suppressed evidence in a second prosecution by a different sovereign. For while the *Rea* order ran counter to the policy of New Mexico, the order here, had it been recognized as valid, would have effectuated not only the policy of the United States but also that of Oregon.

IV. Inasmuch as the District Court ruled that the validity of the Federal search warrant was immaterial and accordingly prevented petitioners from adducing evidence to establish its invalidity, the Court of Appeals was not there-

after free to affirm that warrant's validity on the present record.

A. The holding below on that point violates the rule that an appellate court may not sustain a ruling on appeal on a factual basis left undetermined by the trier of facts. *Grunewald* v. *United States*, 353 U.S. 391. Nor is there any inconsistency between petitioners' arguments here and in the court below; there was probably enough in the record to establish the invalidity of the Federal search warrant, but, since petitioners were prevented from pursuing the matter on the footing that such invalidity was immaterial, the warrant could not thereafter be sustained as valid on appeal.

B. The court below was plainly wrong in holding that petitioners' motion to suppress was not based on any of the grounds specified in Criminal Rule 41(e), as examination of that motion clearly shows.

C. The court below was similarly wrong in holding that petitioners had no standing to file the motion to suppress. (1) Since the property was originally taken—illegally—from the petitioner Clark's home, it is plain that his right to its suppression was not diminished by its subsequent transfer from hand to hand. Nor is it material that Elkins did not live with Clark; Elkins' right to have illegally seized evidence suppressed as to him was still the same. *McDonald* v. *United States*, 335 U.S. 451, 456. (2) *Non constat* anything said in the opinion below, petitioners, both in their motion to suppress and at the hearing thereon, asserted a propriety interest in the seized property. It follows that both had ample standing to have the illegally seized evidence suppressed.

D. Finally, inasmuch as the Federal search warrant was directed at property in the constructive custody of a State court, it was invalid because in violation of the constitutional rule of comity, particularly here, where the State

court's custody furthered the Federal policy against unreasonable searches and seizures. Here the execution of the Federal search warrant not only violated settled doctrines of comity but also frustrated the Federal policy of the Fourth Amendment and of the Due Process Clause of the Fourteenth.

ARGUMENT

In this brief petitioners present precisely the same questions that they formulated in their petition, changing however the order thereof. If the Court agrees with their contentions that (a) the evidence used against them was obtained in violation of their rights under the Constitution of the United States and that (b) such evidence is accordingly inadmissible regardless of the non-participation of Federal officers in the original search and seizure by State officers, reversal must follow, and it will be unnecessary to consider what was originally petitioners' first question, viz., whether the rule of *Rea v. United States*, 350 U.S. 214, is one of comity. That question, now somewhat more logically arranged in third place, will only be reached if the Court adheres to and reaffirms the so-called "silver platter" doctrine, which—succinctly stated—holds that evidence illegally seized by State officers or private individuals is none the less admissible in a Federal prosecution, provided only that no Federal officers have participated in the original illegality.

I. THE EVIDENCE AGAINST PETITIONERS WAS OBTAINED IN VIOLATION OF THEIR RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES BECAUSE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE.

At the outset, we address ourselves to the circumstances under which the evidence was originally obtained. If, as we contend, those circumstances amounted to an unreasonable search and seizure, then, insofar as the State officers making the seizure were concerned, the Fourteenth Amendment was violated (*Wolf v. Colorado*, 338 U.S. 25), and, to

the extent that the United States itself may be deemed involved, the terms of the Fourth Amendment were violated as well. Accordingly, we address ourselves to the facts of the original taking, and to what we will show to be its two infirmities: First, the search warrant was based on an insufficient affidavit, inasmuch as the affiant lacked sufficient knowledge to constitute probable cause, and executed his affidavit only on information and belief. Second, the articles now in question were not named in the warrant, were not contraband, and hence were not subject to seizure thereunder.

A. The search was unreasonable because conducted pursuant to a search warrant issued on an affidavit that was made without probable cause, being based solely on multiple hearsay.

As has been shown (*supra*, pp. 3-4), the State search warrant was issued on the basis of an affidavit executed by the then District Attorney of Multnomah County, Oregon, one William M. Langley, who deposed on information and belief that there were in the possession of petitioner Clark, in his home "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to exhibit said photographs," and that the source of his information was Chief of Police Herder of St. Helens, Oregon.

Actually, Langley listened in on a telephone conversation between one Brad Williams, a reporter, and Chief Herder, without the latter's knowledge.

Chief Herder's testimony was that he had never talked to Langley, only with Williams. Herder testified that he gave Williams mere hearsay testimony, telling him that it was hearsay, and, further, that Herder himself had no personal knowledge of any obscene or indecent photographs or accompanying sound recordings in the petitioner Clark's possession. R. 72-79.

The Government did not call any witnesses to seek to establish personal knowledge on Langley's part; to the contrary, after Chief Herder was excused, the United States Attorney conceded the illegality of the seizure for purposes of the motion to suppress (R. 79-80, quoted *supra*, p. 13).

That concession was fully justified; an affidavit based on multiple hearsay, as this one was, plainly does not establish probable cause. As this Court has said (*Grau* v. *United States*, 287 U.S. 124, 128),

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury * * * and would lead a man of prudence and caution to believe that the offense has been committed:"

Again (*Nathanson* v. *United States*, 290 U.S. 41, 47),

> "'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation."

See also *Sgro* v. *United States*, 287 U.S. 206.

It is true that, in determining whether probable cause exists sufficient for an arrest without a warrant, hearsay may be enough when coupled with other information. Thus only at the last Term, this Court said in *Draper* v. *United States*, 358 U.S. 307, 313:

> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States*, [338 U.S. 160] *supra*, at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] suffi-

cient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132, 162."

But, in *Draper*, matter that was hearsay to the arresting agent, Marsh, was not hearsay to his informant. Similarly, in *Brinegar* "There was hearsay, but there was much more." 338 U.S. at 172. Likewise, in *Carroll* "the facts within the officers' knowledge when they intercepted the Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action." *Brinegar*, 338 U.S. at 177.

Here, however, all that Langley had was Chief Herder's admitted hearsay, mere suspicion, which was plainly not sufficient to warrant a man of reasonable caution in believing that an offense had been committed so as to justify breaking into a dwelling house. Indeed, the information in Langley's possession did not meet the requirements for probable cause as restated only during the present Term in *Henry* v. *United States*, 361 U.S. 98, a case which involved the stopping of an automobile.

Consequently, whether or not what was said in *Grau*, *loc. cit. supra*, is still the law even as to search warrants (see the discussion in *Brinegar*, 338 U.S. at 174-175, note 13), it is plain that the multiple hearsay here involved is insufficient to constitute probable cause for any purposes—and indeed, the contrary was not seriously contended below at any time.

The constitutional norm is not different if the meaning of "probable cause" is tested by the commands of the Fourteenth Amendment under *Wolf* v. *Colorado*, 338 U.S. 25, since the the Federal requirement for an affidavit resting on probable cause differs not one whit for the State requirment here in question.

Article I, Section 9 of the Constitution of Oregon forbids, in language substantially identical with that of the

Fourth Amendment, the issuance of search warrants except on affidavits that make a showing of probable cause. An Oregon statute (O.R.S. 141.030; *infra*, p. 108) restates the constitutional prohibition. Another Oregon statute (O.R.S. 141.090; *infra*, p. 108) parallels the Federal criminal sanction (18 U.S.C. § 2235; *infra*, p. 106) against search warrants procured to be issued maliciously and without probable cause. See *Shaw* v. *Moon*, 117 Ore. 558, 245 Pac. 318. And the Oregon decisions recognize the invalidity of search warrants issued upon inadequate affidavits. *Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871; *State* v. *Quartier*, 114 Ore. 657, 236 Pac. 746; *State* v. *McDaniel*, 115 Ore. 187, 193-194, 231 Pac. 965, 967, 237 Pac. 373; *State* v. *Flynn*, 137 Ore. 8, 299 Pac. 694, 300 Pac. 1024. An affidavit based only on information and belief is insufficient for the issuance of a search warrant. *State* v. *Quartier*, 114 Ore. at 664, 236 Pac. at 748.

In this very case two Oregon courts gave effect to the Fourteenth Amendment by holding the search and seizure invalid because undertaken pursuant to a search warrant that rested on an affidavit without probable cause. Significantly, Judge Mears, the very State district judge who had issued the warrant, stated after hearing the evidence concerning Langley's affidavit that he would never have issued the warrant had the true facts been disclosed to him. See R. 411-412, quoted above at p. 7.

It follows that, the warrant being invalid, seizure of property thereunder violated the Constitution of the United States.

B. The search was additionally unreasonable because the evidence seized consisted of non-contraband articles that were not named in the search warrant.

The orginal search warrant in this case authorized a search for "obscene photographs and sound recordings" (Def. Ex. 15, R. 404). In fact, the State officers seized a

vast collection of articles, which, while including "no obscene and indecent photographs with accompanying sound recordings" (R. 406), included the five tape recordings that petitioners thereafter moved to suppress (R. 407-408).

Right on the face of the record, therefore, the search was an unreasonable one, because it extended to articles not named in the warrant. As this Court said in *Marron* v. *United States*, 275 U.S. 192, 196,

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The foregoing principle has since been codified by Rule 41(e), F.R. Crim. P., which lists as the third of five grounds for suppressing evidence, that—

> "(3) the property seized is not that described in the warrant."

This rule is subject to a narrow exception: Regardless of the scope of the warrant, officers engaged in a lawful search are free to seize articles that are contraband, and articles that constitute instrumentalities of crime. *Harris* v. *United States*, 331 U.S. 145, 154-155; *Steele* v. *United States* (*No. 1*), 267 U.S. 498; see *Zap* v. *United States*, 328 U.S. 624, 630, 632: "If in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized."

No doubt the *Harris* case represents the extreme limit of latitude allowed the prosecution. But there is no need to consider here how far its holding still has validity, cf. (*Anne*) *Johnson* v. *United States*, 333 U.S. 10; *Kremen* v. *United States*, 353 U.S. 346, because it is plain that the articles now in question did not and could not come within the exception.

Some of the seized articles did; e.g., the slot machines, which were ordered destroyed by the State court. See O.R.S. 167.535 and 167.540. But tape recordings cannot be equated with burglars' tools or counterfeiting or gambling paraphernalia (*Adams* v. *New York*, 192 U.S. 585, 598; *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C.A. 2)), neither are they contraband like narcotics (*Rea* v. *United States*, 350 U.S. 214), intoxicating liquor in the prohibition era (*Steele* v. *United States* (*No. 1*), 267 U.S. 498) or the Selective Service documents that were involved in the *Harris* case. Tape recordings are not contraband, their possession is not unlawful, and they are not *per se* instrumentalities of crime, being as susceptible to a lawful use as to effectuating an interception forbidden by State or Federal law. To call the five spools of tape here in question instrumentalities of crime would be on a par with thus characterizing a silver teaspoon on the footing that it could conceivably be used to administer poison or habit-forming drugs.

Oregon recognizes that an officer has the right "to seize property that he discovers by his own senses is being then and there used as an instrumentality in the commission of a crime." *State* v. *Muetzel*, 121 Ore. 561, 565, 254 Pac. 1010, 1011. Cf. *United States* v. *Rabinowitz*, 339 U.S. 56. But here, as Minielly's testimony plainly showed, no crime was being committed in his presence when, after he had raised the lid of the hassock at the suggestion of the newspaper reporter who accompanied him (R. 249-250), he saw the five boxes that contained the five electronic tapes now in issue (R. 247, 248, 250).

Interestingly enough, one of the defenses made by the District Attorney in the State District Court to petitioner Clark's motion to suppress was that "None of the aforementioned wiretapping equipment, recordings of intercepted telephone communications or slot machines were seized pursuant to search warrant issued by Hon. John

R. Mears." Par. 5 of Def. Ex. 12 (R. 213; not printed). While, as above indicated, this may well have been a good defense as to the slot machines, it was plainly insufficient as to the electronic tapes.

The result is that, inasmuch as the articles seized and introduced in evidence were neither named in the search warrant nor within the narrow exception of contraband and instrumentalities of crime, the search was likewise unreasonable. It was an exploratory search for evidence, purely and simply, precisely like those condemned in *Go-Bart Co.* v. *United States*, 282 U.S. 344, and in *United States* v. *Lefkowitz*, 285 U.S. 452. Accordingly, the evidence now in question was seized in violation of petitioners' rights under the Federal Constitution.

C. An unreasonable search and seizure by State officers violates the Constitution of the United States.

We think it well to make explicit what up to now has perhaps remained only implicit, namely, that an unreasonable search and seizure on the part of State officers, while not in terms a violation of the Fourth Amendment, is none the less a violation of another part of the Constitution of the United States—the Fourteenth Amendment.

The first ten Amendments, of course, limit only the United States, and not the States; an unbroken line of opinions, from *Barron* v. *Baltimore*, 7 Pet. 243, through *Adamson* v. *California*, 332 U.S. 46, and *Wolf* v. *Colorado*, 338 U.S. 25, so holds. Accordingly, when State seizures used in Federal prosecutions were first complained of in this Court, the complaints met short shrift.

In *National Safe Deposit Co.* v. *Stead*, 232 U.S. 58, 71, the Court said:

> "The objection that the act, in directing the state officers to inspect the contents of the box, operates as an unreasonable search and seizure, raises no Federal question, since the prohibition on that subject in

the 4th Amendment does not apply to the states. *Ohio ex rel. Lloyd* v. *Dollison*, 194 U.S. 447."

Less than two months later, in *Weeks* v. *United States*, 232 U.S. 383, 398, the Court suppressed evidence illegally seized by Federal officers, but refused to suppress evidence similarly seized by State officers, saying,

> "What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. *Boyd case*, 116 U.S. 616, and see *Twining* v. *New Jersey*, 211 U.S. 78."

Thereafter, beginning in 1925, the process of absorption began, and the Fourteenth Amendment was deemed to include, not *eo nomine* but in substance and as a part or aspect of the concept of Due Process of Law, many of the guarantees specifically found only in the first eight. See *New York* v. *Gitlow*, 268 U.S. 652, 666 (1925); cf. *Gilbert* v. *Minnesota*, 254 U.S. 325, 332, 343 (1920); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543 (1922); see Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431 (1926). Without stopping to list the substantive guarantees that have since been deemed included within or excluded from the Due Process Clause of the Fourteenth Amendment since the decision in the *Gitlow* case, it is sufficient simply to note here that in 1949 Due Process was held to include the right to be secure from unreasonable searches and seizures. *Wolf* v. *Colorado*, 338 U.S. 25. This Court said (338 U.S. at 27 28):

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search,

without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. * * * "

We need not stop to inquire whether the facts presented in *Irvine* v. *California*, 347 U.S. 128, would still evoke from this Court the answer then given, for at least two reasons. First, the Supreme Court of California since the date of that decision has adopted the exclusionary rule of the *Weeks* case, see *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, so that conviction on such a set of facts would not now be sustained by the California courts. Second, nothing in *Irvine* is contrary to the proposition now advanced here, that a search and seizure which substantively violates the Fourth Amendment likewise violates the Fourteenth. *Irvine* held, following *Wolf*, that the Fourteenth Amendment did not require the States to adopt the *Weeks* rule, a question of course not presented by the Federal prosecution here involved; and further held that the vicious character of the intrusion by the States officers did not bring the case within the rule of *Rochin* v. *California*, 342 U.S. 165, a matter which is similarly not in issue here.

Indeed, only at its last Term, this Court in effect reaffirmed the view we now urge, namely, that the test of what constitutes a proper search by State officers within the Fourteenth Amendment is to be judged by what would be a proper search under the standards of the Fourth Amendment. *Frank* v. *Maryland*, 359 U.S. 360. While the Court was sharply divided as to the merits, every member agreed on the identity of the yardstick.

It follows that, in the present case, the search and seizure by the State officers in petitioner Clark's home, a preformance which plainly did not measure up to the requirements of the Fourth Amendment, was in consequence equally improper when measured by those of the Fourteenth.

D. The prosecution and both courts below proceeded on the assumption that the evidence in question, which two State courts had successively ordered suppressed, had been illegally obtained.

1. After Chief Herder was excused (R. 79)—and it was his testimony (R. 72-79) which had demonstrated the utter lack of foundation for the affidavit (R. 20-21) underlying the search warrant (R. 404-405) pursuant to which the evidence here in question was first seized—the United States District Judge hearing petitioners' motion to suppress under Criminal Rule 41(e) inquired of the United States Attorney whether the Government was prepared to concede the illegality of the State seizure. The answer then made, and never thereafter sought to be qualified, was that "for the purposes of this matter we may treat it as illegal." See the colloquy at R. 79-80, the essential portions of which are set forth above, p. 13.

2. In denying petitioners' motion to suppress, the Federal District Court indicated that it adopted the rule in *Byars* v. *United States*, 273 U.S. 28, 33, that

> "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

3. The Court of Appeals said (R. 456) that "the question of the lawfulness of the State search and seizure need not be considered," citing half a dozen cases (note 17) of which its own decision in *Rios* v. *United States*, 256 F. 2d 173—now here as No. 52 of the present Term—was the

last. And in *Rios* the court below had said (256 F. 2d at 177),

> "The 'silver platter' doctrine operates on the assumption that the illegality of the state seizure has been established."

4. Accordingly, we believe it fair to summarize the situation by saying that the prosecution and both courts below, while stressing the immateriality of the legality of the original State seizure, actually proceeded on the assumption that it was illegal. In view of the circumstances that two State courts had successively suppressed the fruits of that seizure, and that, unlike *Rios*, no attempt was made by the Government to establish independently the validity of the State seizure, it is plain that the assumption of illegality thus made cannot fairly be characterized as being in any sense a violent one.

At any rate, it is plain that on this record there is no occasion to consider the reexamination issue which is squarely raised in *Rios*.

On principle it would seem that, since the inquiry at this juncture is whether a Federal constitutional right has been violated, the holding of a State court that there was a violation, while of course entitled to respect, would not preclude independent examination of the issue in the Federal court, and that the Federal court may therefore examine the question *de novo*, on the basis of either the same or a more complete record. We are therefore disposed to agree that the course followed by the United States District Court in *Rios* was proper, nor do we read that petitioner's brief in No. 52 as questioning the right to reexamine, however much the petitioner Rios disagrees with the result reached after reexamination.

In the present case, however, neither the prosecution nor the two courts below undertook a reexamination of the successive rulings by two Oregon courts that the original

search and seizure had been illegal; instead, all three assumed that those rulings were correct. We cannot forbear to add that, in view of what has already been set forth above, no holding to the contrary could fairly have been anticipated in any forum.

II. SINCE THE EVIDENCE WAS UNLAWFULLY OBTAINED, IT WAS INADMISSIBLE IN THE PRESENT FEDERAL PROSECUTION REGARDLESS OF THE NON-PARTICIPATION OF FEDERAL OFFICERS IN THE ORIGINAL SEARCH AND SEIZURE BY STATE OFFICERS.

Under this heading, petitioners frankly attack the "silver platter" doctrine, so-called, under which the fruits of an illegal search and seizure are deemed admissible in a Federal prosecution provided only that no Federal officer participates in the original illegal enterprise.

This rule is well-settled so far as most of the lower Federal courts are concerned, and the District of Columbia Circuit's holding to the contrary in *Hanna* v. *United States*, 260 F. 2d 723 (overruling *Shelton* v. *United States*, 169 F. 2d 665 (D.C. Cir.), certiorari denied, 335 U.S. 834) must be regarded as a new departure, standing virtually alone.[1]

[1] We cannot at all agree with the Solicitor General (letter to the Clerk of this Court, Dec. 1, 1958, in *Rios* v. *United States*, now No. 32, this Term) that the decision in *Hanna* is simply to be read "as laying down a rule of evidence which the Court of Appeals has formulated for the District of Columbia under its special supervisory powers."

To begin with, the *Hanna* opinion discusses constitutional issues of the same sort and substance that we discuss here and that the petitioner in *Rios* has already presented; nothing in the opinion indicates that the result was rested on any peculiarities, real or supposed, of District of Columbia law. The sentence (260 F. 2d at 728) reading "On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded" injects a makeweight at variance with all of the balance of the opinion.

And, second, since the District of Columbia is now both a circuit and a district (28 U.S.C. §§ 41, 88), since its judicial

But, so far as this Court is concerned, there are only two square holdings that evidence illegally seized by State officers on their own is admissible in Federal prosecutions. One is *Weeks* v. *United States*, 232 U.S. 383, 398, the other is the *per curiam* in *Center* v. *United States*, 267 U.S. 575. *Burdeau* v. *McDowell*, 256 U.S. 465, involved a theft by private persons. All the other cases that support the rule do so only by way of dictum, of which *Lustig* v. *United States*, 338 U.S. 74, 78-79, is now most frequently cited, no doubt because the prevailing opinion—there was no opinion of the Court—first used the "silver platter" expression, which, as the present record amply shows, now does service as a shorthand statement of the rule.

We submit that the "silver platter" doctrine should now be abandoned: It rested on an assumption which this Court has since rejected; it is unsound in principle, because it places the United States in the unsavory position of utilizing the fruits of a violation of the Constitution to redress a violation of the law; it impairs constitutional values; it frustrates State policies that are in harmony with those of the Federal constitution; and, as the present record amply demonstrates, it breeds unseemly conflicts between State and Federal courts.

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system was further integrated into the Federal system by the Act of May 24, 1949, c. 139, 63 Stat. 89, and since its district court is equally subject to Criminal Rule 26, we submit that prior expressions as to the separateness of the District of Columbia (e.g., *Fisher* v. *United States*, 328 U.S. 463; *Griffin* v. *United States*, 336 U.S. 704) require reexamination in the light of those factors, certainly where the alleged differences between District of Columbia law and Federal law generally do not flow from a statutory differentiation. Cf. *District of Columbia* v. *Little*, 339 U.S. 1; *Carroll* v. *United States*, 354 U.S. 394.

In *Hanna*, the holding that the fruits of an illegal search and seizure by State officers are inadmissible in a Federal prosecution was rested on principle, a principle drawn from the Constitution. On such an issue there cannot in our view be one rule for the District of Columbia Circuit and another for the other ten.

We will proceed to a demonstration of the case against the "silver platter" doctrine after first dealing with two essential preliminaries.

A. The evidence in question was also obtained in violation of State law.

Not only were the tape recordings now in issue obtained in violation of petitioners' rights under the Constitution of the United States, as we have amply demonstrated in Point I, *supra*, pp. 34-46, they were also obtained by officers of the State of Oregon in violation of the Constitution and laws of that State.

Article I, Section 9, of the Oregon Constitution (*infra*, p. 105) prohibits, in words obviously drawn from and virtually identical with the text of the Fourth Amendment, the issuance of search warrants except on affidavits that make a showing of probable cause.

That provision of the State Constitution has been implemented by both the legislative and judicial departments of Oregon.

The Oregon legislature has declared that a search warrant cannot be issued but upon probable cause. O.R.S. 141.030 (*infra*, p. 108).

And the Supreme Court of Oregon has repeatedly held that the lack of probable cause in the affidavit supporting a search warrant renders that warrant void. *Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871; *State* v. *Quartier*, 114 Ore. 657, 236 Pac. 746; *State* v. *McDaniel*, 115 Ore. 187, 193-194, 231 Pac. 965, 967, 237 Pac. 373; *State* v. *Flynn*, 137 Ore. 8, 299 Pac. 694, 300 Pac. 1024.

Finally two Oregon courts in this case, the State District Court (Mears, J.) and the State Circuit Court (Lonergan, P. J.), successively held invalid the original State seizure involved in this case, on the express ground that the search warrant was defective because the maker of the

supporting affidavit lacked personal knowledge sufficient to constitute probable cause.

Under Oregon law (O.R.S. 141.090; *infra*, p. 108), it is a misdemeanor to procure a search warrant to be issued "maliciously and without probable cause." The record made at the trial strongly suggests that the original affiant in the present case, the then District Attorney, Langley, struck at the petitioner Clark because of strong feelings of resentment harbored against his employer, the petitioner Elkins.[2]

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[2] The extent of those feelings of resentment appear from these excerpts from the cross-examination of Langley (9 Tr. 1517, 10 Tr. 1671):

"Q Didn't you cause a narcotics warrant to be issued for Mr. Elkins and try and get a police officer to serve it with instructions that it was a bum beef but you thought he had a gun and then you could have a good pinch on him for carrying a gun?

"A That's not exactly correct. I first suggested that Mr. Elkins be arrested for violation of a traffic ordinance and in connection with that arrest that he be searched and if he had a gun on him then he would have the gun as evidence and you could charge him with being an ex-con in possession of a gun. That's one incident. . . .

. . . . . .

"Q That's the way you felt about Mr. Elkins, isn't it, Mr. Langley?

"A What is that?

"Q That nothing personal; if you had the facts you would prosecute and if you didn't why, you wouldn't?

"A Yeah; I feel that way. I feel that way.

"Q Is that why you suggested he be picked up on a traffic charge and maybe you could convict him for life imprisonment in the penitentiary?

"A That's correct, if we had the facts.

"Q So, you suggested to the officers that they go out and arrest him on a traffic charge and if they did that you hoped that you could find a gun on him and have him committed to the Oregon State Penitentiary for life imprisonment?

"A That's correct—I don't know as I suggested that to the officers, but it was in my mind."

Since however, the question whether circumstances of the original State search and seizure involved a violation of the State criminal law was never litigated at any stage, the argument which follows does not rest on the proposition that the evidence in question was, in addition to its other infirmities, obtained in the perpetration of a misdemeanor.

We have no doubt that a Federal court would not be concluded by a prior State court determination that particular evidence was obtained in violation of State law, certainly where the State court had applied an erroneous measure of constitutionality, cf. *West Virginia* v. *Sims*, 341 U.S. 22, or, even more clearly, where operation of the State law would frustrate Federal policies or even violate the Federal Constitution. Here, of course, the State law and the State policy implement both the Due Process Clause of the Fourteenth Amendment and the deeply imbedded policy of the Fourth. Moreover, here the Federal district judge determined that the illegality of the original seizure as a matter of State law was immaterial. Accordingly, the reexamination question does not arise on this record.

B. Since the validity of the Federal search warrant was held immaterial and was therefore not allowed to be further litigated at the hearing on the motion to suppress, that warrant did not cure the unlawfulness of the original State seizure.

As has been shown, the United States District Judge hearing petitioners' motion to suppress said that it made no difference whether the Federal search warrant, pursuant to which the United States (through F. B. I. Agent Sherk) took possession of the evidence now in question, was valid or not. The district judge said (R. 201), "His right of possession must be based upon some other ground than that of a valid search warrant in his possession." Accordingly, the trial judge cut off petitioners' inquiry as to

whether Sherk had probable cause for executing the affidavit pursuant to which the Federal search warrant was issued (R. 201)—the second ground of alleged invalidity set forth in petitioners' motion to suppress (R. 14)—and at the close of the hearing expressly ruled that the court would make no finding as to the sufficiency of that affidavit nor any determination as to whether the Federal search warrant was legal or illegal on its face (R. 278-279).

We point out below, pp. 91-96, 101-103, that the Federal warrant was a nullity because directed at property which was then in the constructive possession of a State court, and that in any event the Court of Appeals was not free to sustain the validity of the warrant on factual grounds which the District Court had not permitted to be litigated. But it is not necessary to reach and decide those issues at the present juncture.

The question now is whether evidence illegally seized by State officers without Federal participation may be used in a Federal prosecution. The courts below answered that question in the affirmative; we believe that precisely the contrary answer was required. On this record, the Federal search warrant was disregarded at the trial level, and its validity was not permitted to be litigated. Accordingly, we submit that it cannot be availed of here, and that the soundness or otherwise of the "silver platter" doctrine is inescapably presented. We therefore address ourselves to that question, which is the heart of the first part of the case, and which, if determined in petitioners' favor, renders unnecessary any consideration of the second major portion, viz., the inquiry whether the rule of *Rea* v. *United States*, 350 U.S. 214, is one of comity.

C. The fruits of a State search and seizure unlawful under both State and Federal law are inadmissible in a Federal prosecution.

1. The assumption underlying the "silver platter" doctrine has since been rejected by this Court.

The "silver platter" doctrine rests on the second holding in *Weeks* v. *United States*, 232 U.S. 383, 398, to the effect that the evidence in that case seized by State officers on their own was not subject to suppression. As has been shown, that holding rested on the proposition that the Fourth Amendment did not bind the States, a proposition which was still law when the State seizure aspect of *Weeks* was followed in a *per curiam* (*Center* v. *United States*, 267 U.S. 575) and when it was restated by way of dictum (*Byars* v. *United States*, 273 U.S. 28, 33, quoted *supra*, p. 44; *Feldman* v. *United States*, 322 U.S. 487, 492) or assumed and distinguished (*Gambino* v. *United States*, 275 U.S. 310). Until 1949, accordingly, the "silver platter" doctrine rested on a firm doctrinal foundation.

Then came *Wolf* v. *Colorado*, 338 U.S. 25, with its holding that the substance of the Fourth Amendment was a part of the Due Process of Law guaranteed by the Fourteenth Amendment against invasion by State action. At this point, the doctrinal underpinning of the State seizure aspect of *Weeks* disappeared, as indeed Judge Hastie pointed out in *Hanna* v. *United States*, 260 F. 2d 723 (D.C. Cir.), *supra*, p. 46, the case in which the District of Columbia Circuit overruled its earlier espousal of the "silver platter" doctrine in *Shelton* v. *United States*, 169 F. 2d 665 (D.C. Cir.), certiorari denied, 335 U.S. 834. *Cessante ratione legis, cessat ipsa lex*; cf. *Funk* v. *United States*, 290 U.S. 371, 381-385; Criminal Rule 26.[3]

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[3] "* * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

At first blush Judge Hastie's conclusion may be questioned; it may be thought that *Wolf* could not have undercut the State seizure aspect of *Weeks*, since *Wolf* was decided on the same day as *Lustig*, the case which coined the "silver platter" expression; and that if *Wolf* actually spelled the demise of the "silver platter" doctrine, then the concurring opinion in *Lustig* of Murphy, Douglas, and Rutledge, JJ. (338 U.S. at 80) should have been the prevailing opinion in that case.

To this suggestion there are a number of answers:

First, there was no opinion of the Court in *Lustig*, a circumstance which indeed impairs its weight as a precedent under the unquestioned rule. *United States* v. *Pink*, 315 U.S. 203, 216; *Hertz* v. *Woodman*, 218 U.S. 205, 212-214.

Second, the prevailing opinion in *Lustig* expressly disclaimed passing on the present issue, saying (338 U.S. at 79), "Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers."

And, third, the full reach of all the implications of a holding as far-reaching as that in *Wolf*, which for the first time included the substance of the Fourth Amendment within the Fourteenth Amendment's Due Process Clause, could not have been perceived at the outset. Certainly the proposition now in question could not possibly have been argued by counsel, since at the time of the *Lustig* argument *Wolf* had not yet been decided. Significantly enough, the concurring opinion in *Lustig*, while reaching the result for which we contend, did not place that result on the grounds articulated here and in Judge Hastie's opinion in *Hanna*.

It is also interesting to note that the distinction between State seizures and Federal seizures, which first appears in *Weeks*, was not argued by either side in that case.

Appellant said nothing on that score, and the United States submitted the case, without argument (232 U. S. at 385), on a 3-page brief of which less than one full page was devoted to argument. That portion began by saying U.S. Br., No. 461, Oct. T. 1913, p. 2), "The question is no longer open." Rarely has a vital constitutional question been more inadequately presented by those whose duty it is to assist the Court.

Accordingly, while we cannot agree with the petitioner Rios that the "silver platter" question is still open (Pet. Br., No. 52, this Term, pp. 39-40), we think that the earlier holdings and expressions of this Court on that question can no longer be deemed authoritative since the date of the decision in *Wolf*, and that, for reasons next to be stated, they offend both against sound policy as well as against sound federalism.

2. When the United States uses illegally obtained evidence, howsoever acquired, it ratifies and adopts the illegality with all of the taint thereunto appertaining.

In 1928, more than thirty years ago, a closely divided Court decided *Olmstead* v. *United States*, 277 U. S. 438; and approved what still stands as the ultimate in lawless enforcement of law, viz., the commission of violations of State law in the course of punishing a violation of Federal law.

So much of *Olmstead* as held that wire-tapping did not constitute an unreasonable search and seizure prohibited by the Fourth Amendment still stands, despite opportunities for reconsideration. *Goldman* v. *United States*, 316 U.S. 129; *On Lee* v. *United States*, 343 U.S. 747. Except in its application to State criminal proceedings, see *Schwartz* v. *Texas*, 344 U.S. 199, the significance of the *Olmstead* holding on that score was minimized by the enactment in 1934, of § 605 of the Communications Act of that year (47 U.S.C. § 605; *infra*, *pp.* 106-107), a provision which on the whole has been broadly interpreted to give

ungrudging scope to its terms and to effectuate its policy. *Nardone* v. *United States*, 302 U.S. 379; *Nardone* v. *United States*, 308 U.S. 338; *Weiss* v. *United States*, 308 U.S. 321; *Benanti* v. *United States*, 355 U.S. 96; cf. *Goldstein* v. *United States*, 316 U.S. 114; *Rathbun* v. *United States*, 355 U.S. 107.

There is, however, another aspect of *Olmstead* which, we submit, should be reconsidered—the violation of State law on the part of the Federal officers that was there involved. We read Mr. Justice Holmes' oft-quoted "dirty business" comment (277 U.S. at 470) to apply, not to wire-tapping as such, but only to the circumstance that the wire-tapping in *Olmstead* involved a violation of State law. He said (*loc. cit. supra*):

> "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.
>
> "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385. And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has

authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own."

Very plainly, the foregoing passage was not directed at wire-tapping as such independently of the State law which punished that act. And the same views were set forth in the non-constitutional portion of Mr. Justice Brandeis' dissent in the same case. He said (277 U.S. at 479-485 [footnotes omitted]):

"Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. Pierce's Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin* v. *Brundage*, 276 U.S. 36, *id.* 604.

"The situation in the case at bar differs widely from that presented in *Burdeau* v. *McDowell*, 256 U.S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wire-tapping and of facts ascertained thereby. There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by

these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

"As Judge Rudkin said below: 'Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States.' The Eighteenth Amendment has not in terms empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. Compare *Maryland* v. *Soper*, 270 U. S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authorty to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction.

"When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare *The Paquete Habana*, 189 U.S. 453, 465; *O'Reilly deCamara* v. *Brooke*, 209 U.S. 45, 52; *Dodge* v. *United States*, 272 U.S. 530, 532; *Gambino* v. *United States*, 275 U.S. 310. And if this Court should permit the Government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

"Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of

unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

"The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

"Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

We submit that the time has come to reconsider the violation-of-State-law aspect of *Olmstead*. We submit that Mr. Justice Brandeis expounded sound doctrine on that issue. We submit that this Court should now adopt as law the ethical views which he then elucidated.

3. When evidence unlawfully or criminally seized by State officers is used in a Federal prosecution to obtain a Federal conviction, such evidence has in fact been gathered on behalf of the United States, and must therefore be excluded.

Prior to *Wolf* v. *Colorado*, 338 U.S. 25, inquiry as to whether there was Federal participation in a particular search that was illegal under Federal standards frequently presented difficult problems, particularly where the State officers actually making the illegal search were acting in furtherance of the enforcement of Federal law.

A classic instance was *Gambino* v. *United States*, 275 U.S. 310, which arose in New York during the prohibition era, but after the State prohibition law had been repealed. There State officers had made an illegal search, the fruits of which would have been inadmissible in a Federal prosecution under the doctrine of *Byars* v. *United States*, 273 U.S. 28, if there had been Federal participation. In fact, there had been no Federal participation, but inasmuch as the State officers subsequent to the repeal of the State prohibition law had been directed by the Governor of the State to assist in the enforcement of the National Prohibition Act, the Court held that they had been acting on behalf of the United States even though they were not agents of the United States, and accordingly excluded the evidence which they had obtained and then had turned over to Federal officials for Federal prosecution. The Court said (275 U.S. at 316-317):

> "We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evi-

dence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation, as by the state officers acting under direction of the federal officials. Compare *Silverthorne Co.* v. *United States*, 251 U.S. 385, 392. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to enquire."

The Court then (275 U.S. at 317-318) proceeded to distinguish "the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes."

Since *Wolf*, as has been shown, the basis for such decisions no longer exists. Accordingly, we believe that the rationale of *Gambino*, quoted above, to the effect that "The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the [State] troopers on behalf of the United States," applies in every respect to the present case.

That is to say, when the United States, through its agents, took possession of the tape recordings belonging to the present petitioners, and used those recordings to prove the *corpus delicti* of the offense charged in the present Federal indictment, the United States was, inescapably, ratifying the search and seizure originally made by the Oregon officials, and was making that search and seizure its own.

We do not believe that the situation should be different even if the original seizure had been a theft by private individuals rather than an illegal search by State officers under the color of an invalid warrant. Here, too, we submit that the governing principle was stated by Brandeis and Holmes, JJ., dissenting, in *Burdeau* v. *McDowell*, 256 U.S. 465, 476-477:

> "Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?
>
> "That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender, and that the papers could have been subpoenaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful because it does not violate constitutional prohibitions, and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

It does not become the United States to step into the shoes of State officers who, as here, have violated both the constitution and law of their own state as well as the Fourteenth Amendment to the Constitution of the United States.

4. When the United States uses in a criminal prosecution evidence that is obtained through an illegal search and seizure by persons other than Federal officers, it is giving enforcement to private or State action so as to transform the search and seizure into Federal action.

But it is not necessary to rely entirely on the ascetic conception of public morality that the late Mr. Justice Brandeis drew from equity, from law, and from generally accepted ethical principles. For since *Olmstead* v. *United States*, 277 U.S. 438, there has been decided not only *Wolf* v. *Colorado*, 338 U.S. 25, with its holding that the Fourteenth Amendment includes the Fourth's prohibition against unreasonable searches and seizures, but also *Shelley* v. *Kraemer*, 334 U.S. 1, which held that a private agreement is transformed into State action when it is given enforcement by State courts. By parity of reasoning, therefore, State action is transformed into Federal action when its fruits are used in furtherance of a prosecution in the Federal courts.

It will be recalled that, for many years, it was not possible to obtain an adjudication as to the constitutionality or otherwise of restrictive racial covenants that by their terms forbade sale of real estate to members of particular racial groups. Cf. *Corrigan* v. *Buckley*, 271 U.S. 323, dismissed for want of jurisdiction because of the absence of a substantial constitutional question.

Later, however, see *Shelley* v. *Kraemer*, 334 U.S. 1, the point was decided otherwise, and the holding was that, when such a covenant—a purely private agreement—is given effect by State courts by way of an injunction preventing its violation, such enforcement constitutes State action, with the result that its validity must be tested by the commands of the Fourteenth Amendment.

This Court said (334 U.S. at 14, 18):

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as

action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."

* * * * * *

"The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

We submit, therefore, that when the United States utilizes the fruits of a seizure by State officers or, for that matter, by private citizens, in order to enforce the Federal criminal law in the Federal courts, such utilization in the course of a criminal prosecution constitutes Federal action, and is accordingly subject to the limitations of the Bill of Rights.

Consider the present case: Without the reels of tape recordings illegally seized by the State officers, the United States would not have had a case against these petitioners. The *corpus delicti*—the intercepted communications—was in those recordings, and nowhere else. No interception in violation of the statute could have been proved had the recordings not been received in evidence. Consequently the use of those recordings, in a Federal prosecution pursuant to which individuals will be fined and imprisoned, constitutes Federal action, regardless of the original source of the recordings or of the means by which they were acquainted. Accordingly, since the taking of the recordings violated petitioners' constitutional rights, those recordings may not be received in evidence in any Federal court.

As was said in *Weeks*, 232 U.S. at 393, if such articles "can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed is concerned, might as well be stricken from the Constitution."

Nor is the situation different if the Fourteenth Amendment be substituted for the Fourth; courts of the United States have a duty to uphold all of the Constitution, not simply selective portions thereof. Indeed, if freedom from improper searches is a part of Due Process under the Fourteenth Amendment, it necessarily constitutes a part of Due Process under the Fifth. *Bolling* v. *Sharpe*, 347 U.S. 497.

Surely there can be no clearer example of Federal action than a Federal criminal prosecution which if successful will deprive these petitioners of their liberty. That being so, the prosecution here in question is subject to the constitutional restriction, and the evidence in question must therefore be excluded. Any other holding would render meaningless the constitutional guarantee against unreasonable searches and seizures which since 1949 has limited not only the United States but also the several States.

5. Federal constitutional interests are frustrated rather than furthered when, as here, evidence (a) inadmissible in a State court because illegally seized, which (b) would have been equally inadmissible in a Federal court if similarly seized by or on behalf of Federal officers, and (c) which if Federal officers had similarily seized they would not have been permitted to transfer to State officers for purposes of State prosecution, should now be (d) held admissible in a Federal court because transferred from State to Federal custody rather than in the other direction.

Any notion that the "silver platter" rule sanctioned and applied by the court below somehow promotes the basic consideraitons of federalism that are reflected in the essential separateness of State and Federal prosecutions (cf.

Feldman v. *United States*, 322 U.S. 487; *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187) is quickly dispelled once the problems presented by the case at bar are analyzed.

Four situations are possible:

(1) Evidence is illegally seized by Federal officers and is sought to be used in a Federal prosecution.

(2) Evidence is illegally seized by Federal officers and is by them sought to be turned over to State officers for use in a State prosecution.

(3) Evidence is illegally seized by State officers and is sought to be used in a State prosecution.

(4) Evidence is illegally seized by State officers and is by them sought to be turned over to Federal officers for use in a Federal prosecution.

Case (1), since *Weeks* is of course perfectly clear: The evidence is inadmissible.

Case (2) is equally clear since *Rea* v. *United States*, 350 U.S. 214: The Federal officers will be enjoined from turning over to State officers the fruits of their illegal activities.

Case (3) is, in Oregon, similarly crystal clear: The evidence is inadmissible.

Case (4) is the present case, and we ask, on what principle of federalism, by what calculus of constitutional values, does the illegally seized evidence become admissible here, simply because the transfer has been from State to Federal officers rather than *vice versa*?

The present record (R. 100-103, 105-106, 117-119, 203-204, 262, 268) convincingly documents the comment made by this Court within the year (*Bartkus* v. *Illinois*, 359 U.S. at 123), to the effect that cooperation between State and Federal authorities "is the conventional practice between the two sets of prosecutors throughout the country." It is thus

plain that to admit the illegally seized evidence in Case (4) alone would not further federalism, but would frustrate it, because it would evade rather than enforce a basic constitutional command whose substance is equally binding upon both Federal and State officers.

Right there lies the essential vice of the "silver platter" doctrine, certainly since *Wolf* was decided: It puts a premium on a particular kind of transfer, and thus, necessarily, encourages subterfuge and evasion—while simultaneously promoting disrespect for law and a concomitant contempt for a freedom that is comprehended within the concept of ordered liberty.

Indeed, having in mind that the present case arose in a State that follows *Weeks* and which bars the use of illegally seized evidence in its own courts, the holding now under review places the Federal Government in the indefensible position of frustrating State policies, not indeed in furtherance of any paramount Federal policy, but in derogation of the Federal policy that is explicitly set forth in the Fourth Amendment and is also comprehended within the Due Process Clause of the Fourteenth.

Instances are legion where the exercise of Federal power and the operation of the Federal Constitution necessarily override State policies. As Mr. Justice Holmes remarked nearly fifty years ago, "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." *Law and the Court*, in *Speeches* (1913) 98, 102. Other and more recent instances of such conflicts come readily to mind. *Cooper* v. *Aaron*, 358 U.S. 1; *United States* v. *Raines*, No. 64, this Term; *Hannah* v. *Larche* and *Hannah* v. *Slawson*, Nos. 549 and 550, this Term; *United States* v. *Thomas*, No. 667, this Term.

Here, however, the State policy against unreasonable searches and seizures is identical with the Federal policy.

Moreover, if the transfer had been from Federal to State officers, instead of, as here, *vice versa*, then the evidence would have been inadmissible in a State prosecution under the rule of the *Rea* case. Accordingly, we are at a loss to understand what possible Federal policy or what particular doctrine or clause of the Constitution is being furthered by the holding now under review.

If the present case had arisen in a non-*Weeks* jurisdiction it would be somewhat less dramatic since no State policy against the use in State prosecutions of illegally seized evidence would then be frustrated. But the Federal policy of the Fourteenth Amendment would still be impeded by the use of evidence thus obtained. In short, the controlling feature of this and other "silver platter" cases is not whether the evidence illegally seized by State officers can be used in a State court—that is simply a question of *Weeks* or non-*Weeks* in a particular State—the controlling feature is that where evidence is illegally seized, such seizure violates either the Fourth or the Fourteenth Amendment depending on who was responsible therefor, and consequently it should be equally inadmissible when offered in a Federal prosecution. After all, a court of the United States sits to protect and defend the entire Constitution of the United States, not to give effect to and participate in the violation of a particular part of that instrument.

It is also to be noted that in the present instance the substantive offenses are identical. Petitioners were indicted by the State grand jury for violation of the State wire-tapping statute, Ch. 675, Ore. Laws 1955, *infra*, pp. 108-109; see R. 17, 26, 27, 290, 427. Thereafter they were indicted by the Federal grand jury for violation of the Federal wire-tapping statute, 47 U.S.C. §§ 501 and 605, *infra*, pp. 106-107 (R. 4-11).

Passing the point that the Federal act probably occupied the field, cf. *Pennsylvania* v. *Nelson*, 350 U.S. 497, having

regard to the unquestioned holding that intrastate communications fall within the Federal proscription (*Weiss* v. *United States*, 308 U.S. 321), it is thus clear that both sovereignties were striking at substantially identical conduct. Why then, when under three combinations of circumstances successful prosecution would have been impossible because of the lawless manner in which the *corpus delicti* was obtained, should a fourth combination be permitted to succeed, the same illegal seizure being involved?

The answer is that it should not be, as a recapitulation of the four possible situations will show.

(1) If the tape recordings that evidenced the offense of tapping wires had been seized by Federal officers in the same way that those recordings were in fact seized by the State officers, then, without any doubt whatever, a motion to suppress under Criminal Rule 41(e), in a Federal prosecution under 47 U.S.C. § 501 for violating 47 U.S.C. § 605, would and indeed must have been granted under the *Weeks* rule, and the prosecution would fail.

(2) If thereafter the same Federal officers sought to turn over the fruits of their illegal seizure to State officers, as a predicate for a subsequent prosecution in the State courts for violation of the State anti-wire-tapping statute, a Federal court would have prevented the Federal officers from thus evading the Federal Criminal Rules' prohibition against unreasonable searches and seizures. *Rea* v. *United States*, 350 U.S. 214.

(3) In the present case, since the tape recordings that evidenced the offense were illegally seized by State officers, those recordings were successively suppressed by two State courts, and in consequence the State indictment that charged petitioners with violating the State anti-wire-tapping statute was, necessarily, dismissed; no prosecution was thereafter possible.

(4) Consequently here, once the recordings thus illegally seized by the State officers and suppressed by the State

courts were thereafter turned over to Federal officers and used in furtherance of a Federal prosecution for violating 47 U.S.C. § 605, they should also have been suppressed.

No sound theory of law, of social interests, of federalism, or of constitutional interpretation requires that, in this fourth instance alone, the illegally seized tapes should be admissible. To the contrary, the considerations already canvassed imperatively impel the conclusion that the same result must follow as in the other three situations with the consequence that the judgment below, which held the contrary, must be reversed.

6. The present case graphically demonstrates that application of the "silver platter" doctrine results in "a disreputable collision of jurisdictions"

On Mr. Justice Holmes' view that "we need education in the obvious more than investigation of the obscure" (*Law and the Court* (1913), in *Speeches*, 99), it may not be amiss to recur to some fundamentals.

The essence of federalism is that two sovereignties, one national, the other local, both exert power over the same territory. See *Ableman* v. *Booth*, 21 How. 506, 515-516, 523; *Tarble's Case*, 13 Wall. 397, 406-407; *Ponzi* v. *Fessenden*, 258 U.S. 254, 259; *Feldman* v. *United States*, 322 U.S. 487, 490-491. The essence of a healthy and effective federalism requires that conflict between the instrumentalities of two sovereignties be minimized, and that, in particular, collisions between their separate systems of courts be prevented. Absent any conflict between State and Federal law and policy—and here there is none, as the United States and Oregon are as one in their condemnation of the use of illegally seized evidence—absent any such conflict, the problem becomes one "of preventing interference, friction, and conflict between the federal and state courts." Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930).

This case graphically demonstrates that, so long as the "silver platter" doctrine remains law, there is certain to be a maximum of interference between State and Federal courts, particularly in the many States that follow the *Weeks* rule.

First conflict. Notwithstanding the fact that two State courts had suppressed as illegally seized the evidence here in question (R. 21-28), on grounds that conformed to Federal standards (*ibid.*; and see R. 411-414), the United States District Court, on the strength of the "silver platter" doctrine (R. 278-286), nonetheless ordered the same evidence admitted (R. 398-399), and was sustained in its ruling by the Court of Appeals (R. 456).

There is no question here, as there was in *Rios* (No. 32, this Term), of the right of the Federal court to reexamine the State court's determination. Nor is there any question here, as there is in *Rios*, of the Federal court reaching a different conclusion on an independent review of a more complete record of the circumstances of the seizure. To the contrary, the holding of both Federal courts here was that the illegality of the seizure—which under the doctrine of *Wolf* v. *Colorado*, 338 U.S. 25, involved a violation of the Federal Constitution—was immaterial.

Second conflict. After the United States District Court had denied petitioners' motion to suppress, the State Circuit Court enjoined seven named State and County officers from testifying in the United States District Court concerning the circumstances of the seizure (R. 301-304). As the State Circuit Court's opinion shows (R. 295-301), its order was based on the rule of this Court in the converse situation in *Rea* v. *United States*, 350 U.S. 214.

Third conflict. Notwithstanding the State Circuit Court's restraining order, the United States District Court, over petitioners' objection, directed each of the enjoined witnesses to answer, and they did so, *supra*, pp. 19-21).

Fourth conflict. Petitioners moved in the State Circuit Court to cite all of the foregoing witnesses for contempt, viz., for their violation of the terms of the State Circuit Court's order (R. 434-438).

Fifth conflict. The United States Attorney brought suit in the name of the United States to enjoin petitioners from further prosecution of the above-mentioned contempt proceedings, and obtained a restraining order as prayed for (R. 422-448).

Thus the application of the "silver platter" doctrine in this case has resulted in five conflicts, a situation that may well be characterized in this Court's words (*Orton* v. *Smith*, 18 How. 263, 266), as "a disreputable collision of jurisdictions."

Contrariwise, suppose there were no "silver platter" doctrine: As we have said, we do not suggest for a moment that the Federal court would not be free to reexamine *de novo* the alleged illegality of the original State search. Thus in individual instances the Federal court might well reach a determination different from that of the State court on the issue of illegal search and seizure *vel non*. Such a reexamination *de novo* would also assure against frustration of Federal action if evidence essential to such action should for any reason be colorably suppressed.

But, once the Federal court found that the original State seizure was indeed illegal under Federal standards, once a Federal prosecutor admitted, as the United States Attorney here admitted (R. 80), "that for the purposes of this matter"—the Federal motion to suppress—"we may treat it"—the State search—"as illegal," then that ends the inquiry, and then there is no possibility of any further collision between State and Federal courts.

Nor would such an avoidance of conflict involve any surrender of Federal rights—or even any appeasement to opponents of Federal supremacy. Quite to the contrary,

elimination of the "silver platter" doctrine would strengthen the position of the Constitution of the United States, because it would insure that the courts of the United States respect and give effect to the prohibition against unreasonable searches and seizures that is embodied in the Fourteenth Amendment as well as to the same prohibition more specifically formulated in the Fourth. The obligation to support and defend the Constitution of the United States extends to every part of that instrument; there is no room in Federal jurisprudence for a merely selective enforcement of its provisions.

7. Since the "silver platter" doctrine now has neither doctrinal nor practical support, it should be abandoned.

The doctrinal basis of the "silver platter" doctrine, which was simply the undoubted rule that the Fourth Amendment does not apply *eo nomine* to the States (*Weeks* v. *United States*, 232 U.S. 383, 398), has been completely undercut by the later holding of *Wolf* v. *Colorado*, 338 U.S. 25, to the effect that freedom from unreasonable searches and seizures is protected from State action by the Due Process clause of the Fourteenth Amendment.

Consequently every illegal search by State officers necessarily involves a violation of the Federal Constitution, and hence the fruits of such searches should be inadmissible in any Federal prosecution. Surely the result of an illegal search that violates the Fourteenth Amendment cannot have higher standing in a court of the United States than the result of a similar search that has only violated the Fourth.

It follows that since 1949 there has been no further doctrinal support for the "silver platter" rule.

Nor is the ethical or practical case for the "silver platter" rationale any sounder. When the United States uses illegally seized evidence, howsoever acquired, it necessarily ratifies and adopts the illegality, and places itself *in pari*

delicto with the original violator. More than that, such Federal use of illegally seized evidence gives judicial enforcement to State or private action and therefore transforms that action into Federal action—which of course is subject to every limitation of the Federal Constitution.

In practice, the continued vitality of the "silver platter" rule encourages subterfuge and evasion, because, as we have demonstrated above, pp. 64-69, its operation means that, in a *Weeks*-rule State such as Oregon, the only present opportunity for the use of illegally seized evidence is for State officers to conduct an illegal search on their own, and then to turn over the fruits thereof to Federal officers for Federal prosecution. The opportunities thus created for evasion of a basic constitutional command are obvious.

Such evasion is particularly likely in view of the normal methods of cooperation between State and Federal law enforcement agencies that is reflected by the present record (*supra*, pp. 13-14). Not only that, but the seized tapes were in part played to a Federal agent by State officers on May 22, 1956 (*supra*, pp. 8, 14), the very time when the motion to suppress was being heard in the State court (R. 410). Nor is this an isolated instance of "cooperation." For both *Byars* v. *United States*, 273 U.S. 28, and *Lustig* v. *United States*, 338 U.S. 74, were on the line that separates participation from independent action, and in both instances the courts below, which had held that there was no Federal participation in the original seizure, were reversed.

The "silver platter" rule, accordingly, does not advance the cause of federalism—but only that of sneakiness.

Additionally, the "silver platter" rule opens the door wide to continued and consistent conflict between State and Federal courts, conflict which is the more unnecessary since in this case the same policy—freedom from unreasonable searches and seizures—is sought to be enforced by both

sets of courts. The present case dramatically shows that these possibilities of conflict are actual and not imaginary dangers.

Far from vindicating any Federal interest, the application of the "silver platter" rule results in a selective enforcement of the Constitution, preferring the Fourth Amendment over the Fourteenth essentially because of the happenstance of which government employed the officers who effected an illegal search and seizure that offended against the standards of both.

For all of these reasons, we submit that the State seizure aspect of *Weeks* and all later expressions to the same effect "can no longer be guiding" (*Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 143), that "such vitality, as a precedent, as [the State seizure aspect of *Weeks*] then had has long since been exhausted" (*United States* v. *Darby*, 312 U.S. 100, 117), and that accordingly the "silver platter" rule should "be allowed a deserved repose" (Holmes, J., in *Adkins* v. *Children's Hospital*, 261 U.S. 525, 567, 570).

III. THE RULE OF REA V. UNITED STATES, 350 U.S. 214, THAT A FEDERAL COURT AFTER SUPPRESSING EVIDENCE ILLEGALLY SEIZED SHOULD ENJOIN A FEDERAL OFFICER FROM THEREAFTER TESTIFYING IN A STATE PROSECUTION CONCERNING THE SEIZURE, IS ONE OF COMITY, AND IS APPLICABLE IN PARI MATERIA TO STATE SUPPRESSION OF EVIDENCE FOLLOWED BY A FEDERAL PROSECUTION BASED ON THE SAME EVIDENCE

As we have already said, p. 34, *supra*, a decision overruling the "silver platter" doctrine will result in reversal, and will render unnecessary any consideration of the *Rea* problem.

If, however, the "silver platter" rule should be reaffirmed, then the present point is squarely presented.

We may note by way of preliminary that the offhand and summary manner in which the court below disposed of petitioners' contentions under the present heading—"we

have considered them and find no merit in them" (R. 458) —hardly fulfilled the assurance earlier given by the same tribunal, when it denied petitioners' application for a stay pending the filing of a petition for a writ of prohibition, that "their right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence" (R. 306).[4] It is surely not simply preoccupation with a particular doctrine to suggest that the solution of a question as substantial as the scope of *Rea* v. *United States*, 350 U.S. 214, deserved a more articulate response than the court below ultimately gave it.

And we think that the grounds on which the court below at first refused even to consider this point involve such a disregard of both the letter and spirit of the Federal Rules of Criminal Procedure as may well call for clarification by this Court. The details appear in the margin;[4] we proceed to a discussion of the merits of the *Rea* issue.

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[4] As has been shown, *supra* pp. 24-25, petitioners' specification of error challenging the District Court's order to the enjoined witnesses to violate the terms of the State restraining order was plainly and clearly presented. Yet the court below held (R. 458) that it was not required to consider that contention because of asserted noncompliance with C.A. 9 Rule 18 (set forth at note 8, R. 452), in that petitioners' Specification of Error 12 did not "quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted."

Inasmuch as Specification 12 (quoted *supra*, p. 24, note 10) plainly set forth the grounds of petitioners' objection, which went to all of the evidence of the named witnesses on substantive grounds that in no sense involved the rules of evidence (cf. Rule 26, F.R. Crim. P.), literal enforcement of the Ninth Circuit's Rule 18 in those circumstances would have required petitioners to duplicate in their brief some 800 typewritten pages of testimony that were adduced over objections which were clearly expressed and understandingly overruled by the trial judge on numerous occasions.

Such literal enforcement, we submit, would have been improper because in violation of Rule 2, F. R. Crim. P., promulgated by

A. The incidents of a race of diligence are not involved here.

Petitioners' position is that the validity or otherwise of the State restraining order cannot turn on the incidents of chronology — i.e., whether that order preceded or followed the Federal subpoenas—because then there might well be different answers as to different witnesses. See pp. 19-21, *supra*, for the details; these may be summarized here as follows:

(1) All of the eight witnesses in question other than Darby were subpoenaed by petitioners in connection with their motion to suppress. Of the seven remaining, one, Howlett, was excused outright; four others—Minielly, Schrunk, Lonergan, and Cross—were specifically advised that they were still subject to subpoena; while the remaining two, Gurdane and Langley, were somewhat more equivocally told to be subject to call.

We do not think that anything turns on this classification, nor indeed on the precise terms in which the witnesses who were not fully excused were directed to hold themselves available for recall, nor for that matter on the circumstance that only a single such witness—Gurdane—was in fact recalled. For, in our view, all of the subpoenas, which required attendance only at the hearing of the motion to suppress, became *functus* when the trial judge announced his ruling denying the motion to suppress, and thus terminated that proceeding. Once that happened, the subpoenas lapsed of their own terms.

(2) In considering the sequence of events in connection with the restraining order, certain dates must be borne in mind.

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this Court, which specifically directs that the Criminal Rules be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." And Rule 2, like all of the others, applies to criminal cases in Courts of Appeals by the very specific terms of Criminal Rule 54(a)(1).

a. On March 12, 1957, about five weeks after the indictment was returned, the case was set for trial on March 26, (Docket Entry, March 12; not printed).

b. A motion for a 90-day continuance, filed on March 18, was on March 20 granted only for 21 days, advancing the trial date to April 16 (Docket Entries, March 18 and 20; not printed).

c. Petitioners' motion to suppress was filed on March 25 (R. 13).

d. Testimony on the motion to suppress was taken on April 9, 10, 11, 12 (R. 52; Docket Entries, April 9-12, not printed).

e. The motion to suppress was denied on April 12 (R. 278-286; Docket Entry, April 12, not printed).

Not until then was it possible for petitioners to apply to the State court for an order based on the *Rea* doctrine, in view of the principle, well-established in Oregon since the earliest days (*Wells, Fargo & Co.* v. *Wall*, 1 Ore. 295; *Haines* v. *Hall*, 17 Ore. 165, 20 Pac. 831; *Union Light & Power Co.* v. *Lichty*, 42 Ore. 563, 71 Pac. 1044; *Holmes* v. *Graham*, 159 Ore. 466, 80 P. 2d 870), that equitable relief is available only upon a showing that the legal remedy is inadequate. For, very plainly, the legal remedy of a motion to suppress could be invoked in the first instance, nor was it shown to be inadequate until after it had been denied. Immediately thereafter, on April 13, the State proceeding was commenced (R. 423).

(3) In our view, at least three reasons militate against testing the validity of the State restraining order by considerations of priority, by inquiring whether it preceded or followed the date and/or service of particular Federal subpoenas.

First, in any normal situation, where defendants are not rushed to trial as these petitioners were (and thereafter

subjected to Saturday and evening trial sessions, see p. 18, *supra*), there is a far longer interval between the conclusion of the hearing of a motion to suppress and the commencement of the trial. Consequently, in the normal situation, subpoenas for witnesses to appear at the trial would not—as was the case here—be issued and served while a motion to suppress is still being heard. We submit that, whatever the rule ultimately laid down under the present heading, it should be one that is fashioned for all cases.

Second, at least three of the eight witnesses in question —Howlett, Lonergan, Darby—had not been subpoenaed for the Federal trial until after the State restraining order had been issued, and after it had ripened into a preliminary injunction. Therefore, if priority of time is to be the criterion, one result would follow as to these three witnesses, and another as to the remaining five.

Third, to make the decision turn on questions of priority would set off races of diligence, and thus would encourage conflicts and collisions between State and Federal courts rather than assist in ascertaining the proper boundaries between them.

We submit, therefore, that the validity of the State restraining order does not depend in any degree on whether the persons named therein were or were not under Federal subpoena at the time. If the *Rea* doctrine is one of comity, then the State restraining order was effective against all the enjoined witnesses. If the *Rea* doctrine is not one of comity, then the State restraining order was without effect even as to the State officers who were not yet under a Federal subpoena.

B. The Rea ruling rested, not on the Supremacy Clause, but on the proposition that a Federal court should by an in personam decree prevent Federal officers from flouting Federal policies.

If the ruling in *Rea* v. *United States*, 350 U.S. 214, actually rested on the Supremacy Clause of the Constitution, then it might well be argued that although, as there, a Federal court could restrain a Federal officer from testifying in a State court concerning the fruits of an illegal Federal search and seizure, a State court could not similarly restrain a State officer from testifying in a Federal court concerning the fruits of an illegal State search and seizure; and, indeed, the Federal trial judge here directed the enjoined witnesses to testify on the footing that, by reason of the Supremacy Clause, the State restraining order was a nullity (R. 310, 312, 322, 370, 385).

That ruling, we submit, reflects a misreading of the *Rea* case.

There evidence which had been illegally seized by Federal officers under an invalid search warrant was ordered suppressed by a United States District Court pursuant to Rule 41(e), F. R. Crim. P. (*infra*, p. 111). The evidence in question was marihuana, a narcotic drug, which after seizure (28 U.S.C. § 2463) "shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." Thereafter the suppressed evidence was turned over to the State authorities, and Rea was charged in a State court on the basis of that same evidence. This Court held, reversing the courts below, that Rea was entitled to an order enjoining the Federal agent who had seized the marihuana from transferring it to the State authorities, and from testifying with respect thereto in the State courts.

Nothing was said or even intimated by this Court about the Supremacy Clause. The gist of the decision appears in the following (350 U.S. at 217-218):

> "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U.S. 821 *et seq.* The power of the federal courts extends to policing those requirements and making certain that they are observed. As stated in *Wise* v. *Henkel*, 220 U.S. 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:
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> > "'. . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.'
>
> "No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court. To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them.
>
> "The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

C. The present case is in every significant respect, the precise converse of Rea.

This case is the precise converse of *Rea*: Evidence was suppressed by State courts because seized under an invalid search warrant. Petitioners were thereafter indicted in the Federal court on the basis of the identical suppressed evidence. They then obtained an order from the State court forbidding the State and County officials who had been concerned in the illegal seizure from testifying in respect thereto in the Federal court or elsewhere. (We add, parenthetically, that the County officials stand on the same footing as the State officials, inasmuch as, under Oregon law, Counties are not independent governmental units, but are merely territorial subdivisions and political agents of the State. See *State ex rel.* v. *Malheur County Court*, 185 Ore. 292, 203 P. 2d 305; *Mackenzie* v. *Douglas County*, 81 Ore. 442, 159 Pac. 625, 1033; *Yamhill County* v. *Foster*, 53 Ore. 124, 99 Pac. 286.)

Finally, the property illegally seized, which in *Rea* was subject to Federal court order by statute, 28 U.S.C. § 2463, was in this case subject to State court order by the terms of the orders suppressing it (R. 24, 27, 28).

Thus the two cases are, in every material particular, indistinguishable.

The State order was specifically rested on *Rea* by the judge who issued it in order to prevent an abuse of State process (R. 295-304); why then should it not be accorded like effect?

The alleged distinctions asserted by the Government (U.S. Memo. 8-9) do not add up to a difference of substance.

It is said (U.S. Memo 8) that in *Rea* the State prosecution was initiated by the Federal agent who had made the unlawful search and seizure, while here it was initiated, not by the offending State officers, but by Federal officers. But this argument completely overlooks the circumstance that

the offending State officers here, five days after the seizure, made the fruits thereof available to F.B.I. Agent Sherk and played one of the seized tapes for him (*supra*, p. 8), and that Sherk's subsequent taking of the five tapes was under a Federal search warrant which was predicated on what he learned on that occasion (R. 1).

It is also said (U.S. Memo. 8-9), that the State officers here were under Federal subpoena, while in *Rea* "it was not shown that the federal officer had been served with state process." But three of the State officers here, as has been shown (*supra*, pp. 19-21), were not under any Federal subpoena at the time of the State restraining order.

But there is a more fundamental reason why the distinctions put forward by the Government are unavailing, viz., that those factors were no part of the rationale of *Rea*.

We repeat here the passage from *Rea*, 350 U.S. at 217-218, already quoted above, page 80, with "state" substituted for "federal" and *vice versa* wherever those two words appear in the original, and with "constitutional provisions" similarly substituted for "Rules." That passage would then read as follows (substituted words are italicized):

> "A *state* agent has violated the *state constitutional provisions* governing searches and seizures • • •. The power of the *state* courts extends to policing those requirements and making certain that they are observed. As stated in *Wise* v. *Henkel*, 220 U.S. 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:
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> > "'. . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of

authority in connection with the execution of the process of the court.'

"No injunction is sought against a *federal* official. The only remedy asked is against a *state* agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the *federal* court. To enjoin the *state* agent from testifying is merely to enforce the *state constitutional provisions* against those owing obedience to them.

"The command of the *state constitutional provisions* is in no way affected by anything that happens in a *federal* court. They are designed as standards for *state* agents. The fact that their violation may be condoned by *federal* practice has no relevancy to our problem. *State* courts sit to enforce *state* law; and *state* law extends to the process issuing from those courts. The obligation of the *state* agent is to obey the *state constitutional provisions*. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the *state* agent can flout them and use the fruits of his unlawful act either in *state* or *federal* proceedings."

Obviously, then, the State Circuit Court in the present case was fully and thoroughly justified in relying on *Rea* in restraining the State and County officials from using the fruits of their unlawful acts in the subsequent Federal proceedings.

D. The Rea rule is one of comity, and to read it as one of supremacy would nullify rather than effectuate basic constitutional provisions.

The District Court's reliance (R. 310, 312, 322, 370, 385) on the Supremacy Clause was misplaced, essentially for the reason that this clause comes into play only where there is conflict between State and Federal law and policy. E.g., *Testa* v. *Katt*, 330 U.S. 386; *Ableman* v. *Booth*, 21

How. 506. But, where there is no conflict between Federal and State law and policy, the Supremacy Clause in no sense requires automatic precedence for the proceedings of Federal courts in every instance. See Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930).

Here there is no conflict between the policies of the two sovereignties. The United States and the State of Oregon both prohibit, in their respective Constitutions, unreasonable searches and seizures. U. S. Const., IV Amendment; Oregon Const., Art. I, Sec. 9; both *infra*, pp. 105-106. The United States and the State of Oregon both prohibit, in their respective criminal prosecutions, the use of evidence unlawfully seized in violation of these constitutional provisions. *Weeks* v. *United States*, 232 U.S. 383; *State* v. *Laundy*, 103 Ore. 443, 494, 204 Pac. 958, 974-975, 206 Pac. 290; *State* v. *McDaniel*, 115 Ore. 187, 199-209, 231 Pac. 965, 969-972, 237 Pac. 373; cf. *State* v. *Hoover*, — Ore. —, 347 P. 2d 69 (Nov. 25, 1959). Moreover, the Fourteenth Amendment as interpreted in *Wolf* v. *Colorado*, 338 U.S. 25, would prevent the State of Oregon from authorizing unreasonable searches and seizures. And, as has been pointed out at some length above, pp. 34-41, there is no question here either of differing State and Federal standards for determining the unreasonableness or otherwise of particular searches and seizures; or of the right of a Federal court to make an independent reexamination of the identical issue, whether on the same or on a different record.

There being no conflict, the Supremacy Clause does not come into question, and the problem is accordingly not one of supremacy but of comity. In the words of Chief Justice Taft, speaking for this Court in *Ponzi* v. *Fessenden*, 258 U.S. 254, 259, 260:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be

impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

* * * * *

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose."

Thus, just as a State court cannot assume jurisdiction over property in the custody of a Federal court (e.g., *Freeman* v. *Howe*, 24 How. 450), so, reciprocally, a Federal court may not seize property held under the order of a State court. E.g., *Fischer* v. *American Ins. Co.*, 314 U.S. 549; *Lion Bonding Co.* v. *Karatz*, 262 U.S. 77.

That well-established rule was, plainly enough, violated here; because, when the United States Commissioner, who is an arm of the court (see 28 U.S.C. § 631; 18 U.S.C. § 3041; *Todd* v. *United States*, 158 U.S. 278), issued the Federal search warrant (R. 2-3) pursuant to which the five reels of tape recordings used to convict these petitioners were taken into Federal custody, those reels were then in the custody of the State courts (R. 24, 27, 28). *Ponzi* v. *Fessenden*, *supra*, 258 U.S. at 259, teaches that, even in criminal cases, the doctrine of comity requires that "each system shall be effective and unhindered in its vindication of its laws."

Considerations of comity similarly underlie the statute that since 1793 has denied Federal courts the right to stay proceedings in State courts. Section 5 of the Act of March 2, 1793, c. 22, 1 Stat. 334, now 28 U.S.C. § 2283; see *Toucey* v. *New York L. I. Co.*, 314 U.S. 118. True, a Federal court may, notwithstanding that statute, issue a stay to protect Federal property. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220. But here there was never the slightest suggestion that the seized articles belonged to the United States. Indeed, petitioners asserted a proprietary interest therein at all times (R. 13, 182; see quotation at p. 15, *supra*).

Yet neither the terms of 28 U.S.C. § 2283 or of its statutory predecessors, nor the underlying policy of those provisions, precluded this Court in *Rea* v. *United States*, 350 U.S. 214, from holding that the Federal agent there should have been enjoined from transferring property to State officials and from testifying in a State court concerning it.

The order considered in *Rea* did not operate as a stay, nor did it attempt to reach property in State custody; it involved simply an *in personam* restraint by a court of the United States on an officer of the United States. So here; the State restraining order (R. 301-304) was patterned after *Rea*, and was directed against State and County officials to redress in effective fashion a twice adjudicated violation of the State constitution, and to prevent any further abuse of State court process. In no sense was the State restraining order, thus directed at State officials, what the Government now appears to call it (U.S. Memo. 9), an effort "to interfere with a federal prosecution."

The difference between the two is clear, and was pointed out by this Court more than half a century ago. See *Ex parte Young*, 209 U.S. 123, 163:

"It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

"The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former."

The State restraining order here did not undertake to deal with property in Federal custody, nor did it, as in *Riggs* v. *Johnson County*, 6 Wall. 166, and *Amy* v. *The Supervisors*, 11 Wall. 136, attempt to enjoin State officials from complying with prior lawful orders of a Federal court.

In those cases, a Federal court had, by mandamus, directed State officials—County supervisors—to levy a tax to pay the plaintiffs' judgments, and a State court had then enjoined the same officials from levying such a tax. Naturally the State injunction was held invalid in each instance.

If, in the present case, the State restraining order had directed the State and County officials here involved not to comply with the Federal subpoenas at all, we would have a *Riggs-Amy* situation. But here the State restraining order commanded no such action. It left the enjoined officials perfectly free to comply with their several subpoenas, but restricted them only as to particular

testimony, a restriction which was necessary to enforce the State's search-and-seizure policy. The State restraining order was no more an interference with the Federal subpoena than, say, the State's policy as to the attorney-client privilege—and that, assuredly, would justify a member of the State bar, subpoenaed to appear before the Federal court (of whose bar he was not a member), to refuse to testify concerning communications made to him by his clients.

It may be asked, what of *Feldman* v. *United States*, 322 U.S. 487? Passing the point that no State order was there involved, we think that a more telling distinction is that, under an unbroken line of decisions, the privilege against self-incrimination has never been held to be a part of the Due Process of Law that is guaranteed by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U.S. 78; *Adamson* v. *California*, 332 U.S. 46. Compare *Ullmann* v. *United States*, 350 U.S. 422; *Adams* v. *Maryland*, 347 U.S. 179.

In the present case, the State restraining order actually enforced two basic and fundamental Federal policies.

The first of these is embodied in the Due Process Clause of the Fourteenth Amendment, which prohibits unreasonable searches and seizures by a State.

The second is the policy of the Fourth Amendment, with its more specific condemnation of unreasonable searches and seizures, and its implementation through the doctrine that forbids the introduction in evidence of articles unlawfully obtained in violation of its substantive provisions.

In respect of the latter aspect, the Federal courts have blazed the trail, ever since *Weeks* v. *United States*, 232 U.S. 383. At that time, see *Wolf* v. *Colorado*, 338 U.S. 25, 29, 33-38, only a single State, Iowa, excluded illegally seized evidence. *State* v. *Sheridan*, 121 Iowa 164, 96 N.W. 730.

Thirty-five years later, when *Wolf* v. *Colorado* was decided, there were said to be 17 States that applied the *Weeks* doctrine of excluding illegally seized evidence. See 338 U.S. at 29, 38.

A more recent compilation, made in 1956 (50 A. L. R. 2d 531, 536) listed 21 States, together with Alaska and Hawaii, in the *Weeks* column, either by statute or decision. Since then Rhode Island has adopted the *Weeks* rule by legislation (R. I. Pub. Laws 1955, c. 3590; see *State* v. *Hillman*, 84 R. I. 396, 125 A. 2d 94), with the result that 24 States now apply the *Weeks* doctrine.

Oregon has been in the *Weeks* column for some time. See *State* v. *Laundy*, 103 Ore. 443, 494, 204 Pac. 958, 974-975, 206 Pac. 290; *State* v. *McDaniel*, 115 Ore. 187, 199-209, 231 Pac. 965, 972, 237 Pac. 373; cf. *State* v. *Hoover*, — Ore. —, 347 P. 2d 69 (Nov. 25, 1959). As the successive Oregon rulings that suppressed the evidence illegally taken from these petitioners show (R. 21-25, 25-28, 411-414), Oregon gives to the search and seizure provision of the Oregon Constitution (Art. I, Sec. 9; *infra*, p. 105) the same sanction and implementation that *Weeks* gave to the Fourth Amendment to the Constitution.

Thus the Oregon law and policy that both Federal courts below brushed aside were consistent with and in furtherance of Federal law and policy—as the earlier Oregon law and policy (see *State* v. *Ware*, 79 Ore. 367, 373, 154 Pac. 905, 907) were not.[5]

Therefore, unless the Supremacy Clause is now to be used, not to establish the national paramountcy of the Con-

[5] *State* v. *Folkes*, 174 Ore. 568, 588-589, 150 P. 2d 17, 25, certiorari denied, 323 U.S. 779, rejected the Federal rule of *McNabb* v. *United States*, 318 U.S. 332, with respect to a confession. We do not read that decision as repudiating the *Weeks* rule, and the present record convincingly shows that the lower Oregon courts do not so read it either.

stitution, but rather to excise therefrom the substantive protections and prohibitions of the Fourth Amendment as well as a significant application of the Due Process Clause of the Fourteenth Amendment, the rulings below, which refused to give effect to the State restraining order and which rejected the view that *Rea* laid down a doctrine of comity, cannot be supported on the Supremacy Clause ground on which they were rested (R. 305-306, 310, 312, 322, 370, 385).

We submit that those rulings, which under the guise of asserting Federal supremacy actually nullified two vital constitutional provisions, the Fourth Amendment and part of the Fourteenth, involve not only a misreading but indeed a perversion of the Supremacy Clause.

E. Since Oregon excludes illegally seized evidence while New Mexico admits it, the present case is even stronger than Rea for an injunction against testifying and using the suppressed evidence in a second prosecution by a different sovereign.

We have argued above, pp. 81-83, that this case is the exact converse of *Rea*. Actually, however, it is stronger, and for this reason:

In New Mexico, where *Rea* arose, the State courts reject the *Weeks* rule, and admit evidence even though it may have been illegally seized. *State* v. *Dillon*, 34 N.M. 366, 281 Pac. 474; cf. *Breithaupt* v. *Abram*, 58 N.M. 385, 271 P. 2d 827. Since such use by a State of illegally seized evidence does not involve a violation of the Fourteenth Amendment (*Wolf* v. *Colorado*, 338 U.S. 25), Rea's prosecution by the State of New Mexico would, but for the Federal injunction, have been successful. Thus the order which this Court held should have been made had the effect of frustrating a State prosecution, and to that extent nullified a State policy at odds with the Federal policy expressed in the Federal Rules of Criminal Procedure.

Here, on the other hand, the State in which the case arose excludes illegally seized evidence. Therefore these petitioners' prosecution by the State was barred by State law, as indeed the State officials concerned well recognized (R. 225-226). Thus the State restraining order had the effect of furthering not only State policy, but also of furthering the Federal policy that is expressed in the Fourth and Fourteenth Amendments and in the *Weeks* rule.

Consequently, while the *Rea* order ran counter to State policy, the State restraining order here had it been recognized as valid, would have effectuated both State and Federal policies. Accordingly we assert with confidence that this present case is even stronger than *Rea* was for giving substance and content to the fundamental policy against unreasonable searches and seizures.

IV. INASMUCH AS THE DISTRICT COURT RULED THAT THE VALIDITY OF THE FEDERAL SEARCH WARRANT WAS IMMATERIAL AND ACCORDINGLY PREVENTED PETITIONERS FROM ADDUCING EVIDENCE TO ESTABLISH ITS INVALIDITY, THE COURT OF APPEALS WAS NOT THEREAFTER FREE TO AFFIRM THAT WARRANT'S VALIDITY ON THE PRESENT RECORD, NOR WERE THE COURT OF APPEALS' UNDERLYING PREMISES SOUND IN ANY EVENT

If—but only if—all of petitioners' contentions going to the invalidity of the original State search and seizure are rejected, then their convictions can only be sustained on the footing of the validity of the later Federal search and seizure, which was effected pursuant to a Federal search warrant duly issued (R. 2-3). Yet the conclusion of the court below, which indeed so held (R. 456), rests on an indispensable prerequisite to such validity—an affidavit sufficient to establish probable cause—which petitioners were not permitted to challenge. Accordingly, out of an abundance of caution, we have included the present point (Question 4, *supra* p. 3), which invokes the doctrine of *Grunewald* v. *United States*, 353 U.S. 391, to the effect that

an appellate court cannot sustain a conviction on appeal on the basis of facts that were not submitted to the trier of facts below.

A. The holding below that the Federal search warrant was sufficient on the present record violates the rule that an appellate court may not sustain a ruling on appeal on a factual basis that was left undetermined by the trier of facts.

Rule 41(c), F.R. Crim. P. (*infra*, p. 110) prescribes that a search warrant shall issue only on an affidavit "establishing the grounds" for its issuance, and only after the judge or commissioner "is satisfied that grounds for the application exist or that there is probable cause to believe that they exist." Similarly, Criminal Rule 41(e) (*infra*, p. 111) provides that a motion to suppress may be based on the ground that "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued."

Both provisions on their face implement the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Consequently a Federal search warrant issued upon an affidavit that does not establish probable cause is, necessarily, invalid. *Nathanson* v. *United States*, 290 U.S. 41; *Sgro* v. *United States*, 287 U.S. 206; *Byars* v. *United States*, 273 U.S. 28, 29. Indeed, it is a criminal offense to procure a search warrant to be issued "maliciously and without probable cause," 18 U.S.C. § 2235 (*infra*, p. 106).

In the present case, petitioners' motion to suppress alleged, as its second ground, the invalidity of the Federal search warrant because of lack of probable cause in the underlying affidavit; it read as follows (R. 14):

> "b) That the search warrant used by said agent or agents of the Federal Bureau of Investigation on September 5, 1956, in seizing said property is and was invalid, illegal and void in that it is and was

based upon an insufficient affidavit of one Ronald E. Sherk, an F.B.I. agent, and hence said affidavit was illegal, invalid and void, and there was not, therefore, probable cause for the issuance of said warrant;"

At the hearing on the motion to suppress, it was shown that, when Agent Sherk executed the affidavit (R. 1) on which the Federal search warrant (R. 2) was based,

(a) He had never heard four of the five tapes (R. 123-124, 127, 129, 132-133, 142-143, 147-148, 152, 191, 193-194);

(b) He had never heard the three spools of wire (R. 123, 153, 154, 190);

(c) He had no personal knowledge of the manner of interception (R. 150, 193-195);

(d) He had no knowledge of lack of consent by the participants to the conversations on four of the tapes (R. 157-158, 190-191; cf. R. 129-130);

(e) He had no knowledge that the tapes were designed or intended for a use which would violate 47 U.S.C. §§ 501 and 605 (R. 150-152, 191);

(f) Some three and a half months had elapsed between his hearing of a portion of one tape on May 22 and the execution of his affidavit on September 5 (R. 1, 122-126); and

(g) More than three weeks had elapsed between his visual inspection of tapes at the bank on August 13 and the execution of his affidavit on September 5 (R. 174-178).

The ruling of the trial judge, however, was that the validity of the Federal search warrant was immaterial, and accordingly he cut off further inquiry by petitioners' counsel on the issue of Sherk's knowledge or lack of knowledge (R. 200-201, 278-279; quoted *supra*, pp. 14-15, 16). The trial judge specifically told counsel (R. 201) that

his ruling "would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant."

Yet the Ninth Circuit held (R. 456) that

> "The record shows that the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A."

That is to say, the ruling below sustaining the validity of the Federal search warrant necessarily finds as a fact the very issue of probable cause that petitioners were not permitted to challenge.

We submit that the rule of *Grunewald* v. *United States*, 353 U.S. 391, precludes any such result.

There a conviction was reversed because, although the indictment was sufficient to cover submission of a particular theory of continuing conspiracy, that theory was not submitted to the jury, and accordingly "the convictions * * * might have rested on an impermissible ground." 353 U.S. at 415.

Here, however, there is presented an *a fortiori* situation, since the court below sustained the validity of the Federal search warrant on a factual ground that petitioners were prevented from exploring at the hearing on the motion to suppress (R. 200-201, 278-279).

It follows, we submit, that the court below violated the *Grunewald* rule when it sustained the Federal search and seizure on a conclusory assertion (R. 456, quoted just above) which assumed the very issue that the trier of facts advisedly refused to consider.

The Government's argument in this Court (U.S. Memo. 9-10)—"Having pressed the issue as to the validity of the warrant in the Court of Appeals, the petitioners are in a poor position to put that court into error for considering it"—completely misapprehends the nature of our contentions.

Petitioners did argue in the Ninth Circuit that the Federal search warrant was invalid for several reasons, first "by virtue of the insufficiency of the affidavit of F.B.I. agent Sherk and the demonstrated insufficiency of his knowledge." Appellants' Brief, No. 15378, C.A. 9, pp. 51, 52-54.

In the face of that argument, the court below had several courses open on the record before it:

(a) It might have followed the trial judge, and held that, in view of the "silver platter" doctrine, the validity or otherwise of the Federal search warrant was immaterial.

(b) It might have ruled, as it did, that the validity of the Federal search warrant *was* material. On that footing—

(i) It might have held, on the basis of the evidence already adduced regarding the state of Sherk's knowledge (*supra*, p. 93), that petitioners had sufficiently established that this affiant lacked probable cause.

(ii) It might have held, in view of the ruling below cutting off further inquiry, that the case must be remanded with directions to pursue the inquiry further, and to develop all of the facts bearing on what Sherk actually knew when he executed the affidavit on which the Federal search warrant was issued.

But, after petitioners had been prevented from making their record on that issue, the Court of Appeals could not thereafter properly make a finding adverse to them on that precise point. An appellate court may not, as we read *Grunewald*, sustain a conviction on a ground not passed upon by the trier of facts.

That basic issue, it seems fair to note, needs to be reaffirmed. The court below disregarded it here, although, only a few months earlier, it had recognized and given effect to the *Grunewald* doctrine by remanding a reversed conviction. See *Forman* v. *United States*, 261 F. 2d 181 (decided October 27, 1958).[6] And, in another case now pending here (*Schaffer* v. *United States*, No. 111, this Term; see also *Karp* v. *United States*, No. 122, this Term), the *Grunewald* doctrine was and is strongly put forward in the Petition for Certiorari as a ground for reversing the Second Circuit's decision, reported at 266 F. 2d 435. In view of the circumstance that the Government's only answer in that case to the *Grunewald* argument was silence (see Petrs. Reply Memo., No. 111, pp. 3-4, "*Second*"), after which certiorari was granted (361 U.S. 809), it seems reasonable to infer that the present petitioners are not alone in thinking that the rule of *Grunewald* v. *United States*, 353 U.S. 391, continues to have vitality, and that its role in appellate review still needs to be emphasized.

B. The court below was plainly wrong in holding that petitioners' motion to suppress was not based on any of the grounds specified in Criminal Rule 41(e).

In the course of its opinion, the court below said (R. 457):

> "As indicated above, the motion of March 25, 1957, did not seek return of the property mentioned therein, but merely sought suppression of the property as evidence against defendants; nor was the motion based

[6] The original opinion reversed with directions to enter judgment for the appellants. 259 F. 2d 128. On the Government's petition for rehearing, and on the authority of the *Grunewald* case, a new trial was ordered; in the opinion cited in the text above. Thereafter a new petition for rehearing, filed by the appellants, was denied (264 F. 2d 955), and the case is now here on certiorari (359 U.S. 982), and is awaiting decision following argument on November 19, 1959 (No. 43, this Term).

on any of the five grounds specified in subdivision (e) of Rule 41."

We are frankly at a loss to understand the basis for the last portion of the quoted passage.

Criminal Rule 41(e), *infra* p. 111, enumerates five grounds for a motion to suppress, of which the last two named are—

"(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or

"(5) the warrant was illegally executed."

The second ground set forth in the motion (¶ b, R. 14) was that Sherk's affidavit was insufficient for want of probable cause. We do not know how ground (4) of Criminal Rule 41(e) could have been more clearly invoked.

The other four grounds set forth in the motion were—

¶(a), R. 14—invalidity of the original State seizure.

¶(c), R. 14—attacked the "silver platter" doctrine.

¶(d), R. 14-15—original State seizure was made only for purposes of Federal prosecution.

¶(e), R. 15—seized property was in State custody, and hence no Federal jurisdiction to seize it.

We submit that these additional grounds clearly fall within Criminal Rule 41(e)(5), illegal execution of warrant, without the slightest rewriting or expansion of that provision.

Accordingly we repeat, we do not understand on what footing the court below could possibly have stated (R. 457) that petitioners' motion to suppress was not based on any of the grounds specified in Rule 41(e).

C. The court below was plainly wrong in holding that petitioners had no standing to file the motion to suppress.

Further in the course of its opinion (R. 457), the court below said that "defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized." This was based on two grounds (R. 457), first that there was no allegation that the Federal search and seizure were made at any place owned or occupied by the defendants, but only at the First State Bank of Milwaukie, and second that neither defendant had any proprietary interest in the property.

Extended argument is not necessary to establish the complete lack of foundation for both reasons assigned.

1. The court below said (R. 457):

> "The motion did not say, nor does the record show, that the Federal search and seizure were made at any house or place owned, occupied or used by defendants or either of them. Instead, the record shows that the Federal search and seizure were made at the First State Bank of Milwaukie, Oregon."

Now, very plainly, the record shows that the property in question was taken from the home of petitioner Clark, and that, after it was ordered suppressed, it was placed in a safe deposit box in the Milwaukie Bank rented by the Oregon State Police, and held subject to the order of the Oregon courts (*supra*, pages 7-8, 9). That being so, the petitioner Clark's rights to have it suppressed were not diminished by reason of the subsequent transfers of possession. We should have thought that the lack of success for subterfuge in cases of this sort had been sufficiently exposed by *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, *Nardone* v. *United States*, 308 U.S. 338, and *Benanti* v. *United States*, 355 U.S. 96, and that it would now be recognized that such relaying of illegally seized

property could not be availed of by Federal prosecutors to alter the original owner's legal position to his detriment.

Nor is it material that the place from which the property was originally taken was Clark's home and not Elkins' as well. On that aspect of the case, *McDonald* v. *United States*, 335 U.S. 451, is square authority in petitioner Elkins' favor.

There property was illegally seized from the home of one McDonald, where Washington was present, after which it was used in evidence against both. The Government argued (U.S. Br., No. 36, Oct. T. 1948, pp. 14-15) that "Petitioner Washington, who had no interest in the premises searched or the property taken, has no standing to have the seized evidence suppressed as to him." But this Court rejected that argument; it said (335 U.S. at 456):

> "It follows from what we have said that McDonald's motion for suppression of the evidence and the return of the property to him should have been granted. *Weeks* v. *United States, supra; Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 358. It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case, unlike *Agnello* v. *United States, supra,* [269 U.S. at] p. 35, the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative."

2. The court below further said (R. 457):

> "The motion did not say, nor does the record show, that, at the time of the Federal search and seizure—September 5, 1956—defendants or either of them owned or had any proprietary interest in the property seized,[18] or that the property was at that time in the custody or possession of defendants or either of them. Instead, the record shows that the property was not in the custody or possession of defendants or either of them at any time after May 17, 1956."

Now, very plainly, the motion (R. 13) was for an "Order directing that *certain property of which defendants herein are the owners*" be suppressed. [Our italics.]

Moreover, at the hearing on the motion, petitioners' proprietary interest in the seized property was reaffirmed (R. 182, quoted above at p. 15).

We do not understand how petitioners' claim of proprietary interest could have been more clearly expressed. Nor, for reasons just set forth, pp. 98-99, *supra*, do we understand how an illegal taking of property from a person's custody and its transfer to a third party deprives the owner of his right to protest the taking. Next, we cannot understand how, *non constat* the court's footnote 18, quoted below, a claim in March 1957 of present ownership of property alleged to have been unlawfully taken in May 1956 can possibly be read to exclude a claim of ownership in the interim in September 1956—unless of course it is now somehow appropriate, in the second half of the twentieth century, to resurrect "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation

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"[18] As indicated above, the motion contained a statement to the effect that the property seized was, on March 25, 1957, the property of defendants. That, however, was immaterial, if true; for, as indicated above, the Federal search and seizure were made on September 5, 1956." [Footnote in original.]

capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States*, 207 U.S. 368, 372.

Finally, to cap the climax of its demonstration (R. 457-458) that it was "not required to consider defendants' contention that the Federal search and seizure were unlawful," the court below added (R. 458), "However, we have considered it and find no merit in it."

No reasons in support of that conclusion were set forth in the opinion.

D. Inasmuch as the Federal search warrant was directed at property in the constructive custody of a State court, it was invalid because in violation of the constitutional rule of comity.

If the question of the validity or otherwise of the Federal search warrant is ever reached, then there is another reason why it was invalid, namely, that it was directed at property which at the time was in the constructive custody of a State court.[7]

Here the State District Court ordered the tapes impounded in the possession of the Sheriff "to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard" (R. 24).

Thereafter, the State Circuit Court made it clear that neither the State Grand Jury nor the State Attorney

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[7] As we indicated in our Petition for Certiorari (p. 24, note 16, ¶(c)), this issue was not separately presented because in our view it was "subsidiary question fairly comprised" in what is now Question 3 (*supra*, pp. 2-3) in the sense of this Court's Rule 23(1)(c). Accordingly, the arguments under the present heading do not involve the disapproved "practice of smuggling additional questions into a case" after certiorari has been granted. *Irvine* v. *California*, 347 U.S. 128, 129.

General could use the impounded tapes in any way without a court order (R. 26-27, 28):

> "• • • if the Grand Jury of this County has turned any of that material or any of those things that were taken by this illegal search warrant over to the Government of the United States, the Grand Jury had no authority whatsoever to do anything of the kind. No one has any authority to dispose of that or use it in any way without an order of the Court. No order of the Court that I know of has ever been issued to anyone for that purpose.
>
> "• • • if the law in telecommunications has been violated, he must get an order of the Court before the Attorney General can use it. That is the order of the Court and that will be the order when it is prepared.
>
> • • • • •
>
> "I am asking that all of this be turned over to the Attorney General to be disposed of according to the law and by the order of this Court."

Accordingly, when the illegally seized tapes were placed in the First State Bank of Milwaukie in a box rented by the Oregon State Police (*supra*, p. 8), they were *in custodia legis*, subject to orders of the State courts.

While we have found no prior case of a Federal search warrant directed at property in the constructive custody of State courts, there are many adjudications to the effect that, when property is in the custody of a State court, it cannot be reached by process emanating from a Federal court. See, out of many cases, *Fischer* v. *American Ins. Co.*, 314 U.S. 549, 553-554; *Lion Bonding Co.* v. *Karatz*, 262 U.S. 77; *Palmer* v. *Texas*, 212 U.S. 118; *Taylor* v. *Carryl*, 20 How. 583; *Peale* v. *Phipps*, 14 How. 368; *Peck* v. *Jenness*, 7 How. 612; *Hagan* v. *Lucas*, 10 Pet. 400. The doctrine of comity forbids.

Situations have arisen, of course, and more can readily be imagined, where State custody might frustrate overriding Federal policies. See Warren, *Federal and State*

Court Interference, 43 Harv. L. Rev. 345 (1930), for a collection of such instances, of which *Ableman* v. *Booth*, 21 How. 506, and *Tarble's Case*, 13 Wall. 397, are perhaps the best known. See also *Harris* v. *Dennie*, 3 Pet. 292.

But this is not such a case. Here the State court's custody of property which had been illegally seized under a defective warrant furthered the Federal policy against unreasonable searches and seizures, a policy that is expressed both in the Fourth Amendment and in the Due Process Clause of the Fourteenth Amendment. Thus, unlike the cases instanced in the late Mr. Warren's scholarly paper, here the action of the State courts assisted in furthering rather than frustrating Federal interests.

Contrariwise, the execution of the Federal search warrant on property in the constructive custody of the State courts not only violated settled doctrines of comity, such action also frustrated the Federal policy, expressed in the Federal Constitution, which forbids unreasonable searches and seizures.

If, therefore, the present question is reached at all, there should accordingly be no hesitation in declaring the Federal search warrant invalid because of this additional infirmity.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed, and the case remanded to the United States District Court for the District of Oregon, with directions to grant petitioners' motion to suppress.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE OF COURT INVOLVED

1. *Constitution of the United States:*

(a) Clause 2 of Article VI (the Supremacy Clause) is as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(b) The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(c) The Fourteenth Amendment provides in pertinent part:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

2. *Constitution of Oregon:*

Section 9 of Article I provides:

"**Section 9. Unreasonable searches or seizures.** No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and

particularly describing the place to be searched, and the person or thing to be seized."

3. *Federal Statutes*

(a) Section 2235 of Title 18 provides:

"§ 2235. Search warrant procured maliciously

"Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1000 or imprisoned not more than one year."

(b) Section 501 of Title 47 provides:

"§ 501. General penalty

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

(c) Section 605 of Title 47 provides:

"§ 605. Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or

foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication, broadcast or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

4. *Oregon Statutes*

(a) The provisions of the Oregon Revised Statutes (O.R.S.) here pertinent are as follows:

"141.030. Affidavit of probable cause. A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched."

* * * * *

"141.090. Penalties. (1) Any person who maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. * * *"

(b) The pertinent portions of Chapter 675 of the Oregon Laws of 1955, entitled "AN ACT Relating to the obtaining of telecommunications or radio communications without authority; prohibiting the use of evidence so obtained; and providing penalties," are as follows:

"Section 1 [Definitions] * * *.

"Section 2. (1) Except as otherwise provided in section 3 of this Act or subsections (2) and (3) of this section, no person shall:

"(a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which such person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant.

"(b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or facilities of a telecommunication or radio communication company over which messages are transmitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which such person is not a participant.

"(2) The prohibitions in this section shall not apply to officers, employes or agents of a telecommunication or radio communication company who perform the acts prohibited in this section for the purpose of construction, maintenance or conducting of their telecommunication or radio communication service, facilities or equipment; nor shall such prohibitions apply to subscribers or members of their family who perform the acts prohibited in this section in their homes.

"(3) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or obtaining of the contents of any radio or television broadcast transmitted for the use of the general public.

"Section 3. [Court orders for the interception of telecommunications] • • •

"Section 4. [Liability of officer proceeding under expired or unrenewed court order] • • •

"Section 5. [Applications &c for court orders to be confidential] • • •

"Section 6. Evidence of the contents of any telecommunication or radio communication obtained by violation of section 2 of this Act and without a court order under section 3 of this Act shall not be admissible in any court of this state.

"Section 7. Violation of subsection (1) of section 2, or of section 4 or 5 of this Act is punishable, upon conviction, by a fine of not more than $3,000 or by imprisonment in the penitentiary for not more than three years, or by both."

(c) By Chapter 681 of the Oregon Laws of 1959, approved May 27, 1959, the foregoing provisions were substantially amended, and it is the amended wire-tapping statute which now appears as O.R.S. 165.535, 165.540, and 165.545.

Prior to the 1959 amendments, Section 1 of C.675, Ore. Laws 1955, was O.R.S. 165.535, while Sections 2 and 7 appeared in O.R.S. 165.540.

In this connection, it is to be noted that the text of the O.R.S. is revised after each session of the State legislature, by the use of loose-leaf pages.

5. *Rule of Court*

Rule 41 of the Federal Rules of Criminal Procedure provides in pertainent part as follows:

"Rule 41. Search and Seizure

* * * * *

"(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

* * * * *

"(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS AND RAYMOND FREDERICK CLARK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 449–459) is reported at 266 F. 2d 588.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1959 (R. 460), and a petition for rehearing was denied on May 28, 1959 (R. 460–461). The petition for a writ of certiorari was filed on June 19, 1959, and granted on October 12, 1959 (R. 461, 361 U.S. 810). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the state search and the federal search were lawful.

2. Whether evidence obtained by state officers pursuant to a defective state warrant is admissible in a federal criminal trial, where no federal officer participated in, or had prior knowledge of, the illegal state search.

3. Whether a state court, by a temporary restraining order entered in a state civil suit, may enjoin the testimony of witnesses subpoenaed to appear and testify at a federal criminal trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of Article III of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * [and] to Controversies to which the United States shall be a Party; * * *.

Clause 2 of Article VI of the Constitution provides:

> This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

I

THE CONVICTION

A nine-count indictment filed on February 4, 1957, in the United States District Court for the District of Oregon charged petitioners with intercepting and divulging telephone communications, and conspiracy to do so, in violation of pertinent federal statutes (R. 4–11). A jury found petitioners guilty of all counts except counts 3 and 4. On May 21, 1957, petitioner Elkins was sentenced to a total of twenty months' imprisonment and a fine of $2,000. Petitioner Clark was sentenced, that same day, to total imprisonment for four months and sixty days and a fine of $500 (R. 31–34, 400). The court of appeals affirmed the convictions (R. 449–459).

II

THE FEDERAL MOTION TO SUPPRESS

The issues in this case relate solely to the seizure by state officers of tape recordings of telephone communications and related paraphernalia, and the manner in which the articles so seized came into federal hands. The facts shown by the record relating to these issues may be summarized as follows:

A. THE MOTION

On March 25, 1957, prior to their trial on the federal indictment, the petitioners moved for the return of seized property and its suppression as evidence, praying, *inter alia,* that the court order the return of "certain property of which defendants herein are the owners" (R. 13).[1] In this motion and the supporting affidavit executed by their counsel, petitioners alleged that on May 17, 1956, petitioner Clark's residence in Portland, Oregon, had been searched pursuant to a warrant issued by a state court and that five tape recordings, a recording machine, and three spools of recording machine wire had been seized (R. 13, 15-17); that on May 22, 1956, a Multnomah County grand jury had indicted the petitioners for the state offense of wiretapping (R. 17); that the District Court for Multnomah County, Oregon, had held on May 29, 1956, that the state search warrant had been improperly issued and had directed the items seized be "impounded in the possession of the sheriff of Multnomah County,

[1] This claim of ownership was expressly reaffirmed at the hearing on the motion (R. 182).

to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher circuit or Supreme Court before whom the matter may be heard"[2] (R. 24); that the Attorney General of Oregon had deposited the tape recordings and related items with the Oregon State Police for safekeeping and the police in turn had lodged them in a safe deposit box in a commercial bank in Milwaukie, Oregon (R. 18); and that on September 5, 1956, F.B.I. Agent Ronald E. Sherk executed at the bank a federal search warrant for these items, thus bringing them into federal custody (R. 13, 18).

The motion and supporting affidavit further alleged that during the week ending September 15, 1956, both petitioners had moved in the Oregon Circuit Court for Multnomah County for suppression of the tape recordings and other items as evidence in the state prosecution for wiretapping (R. 17–18, 25). On September 17, 1956, the circuit court had held that the search and seizure of May 17, 1956, were illegal, because they were based on a faulty state warrant (R. 26–27) and stated that the Attorney General of Oregon "must get an order of the Court before [he] can use [the items seized]" (R. 25–27). Refusing to suppress the evidence, the court ordered that the property be turned over to the Attorney General of Oregon "to be disposed of according to the law and by the order of this Court" (R. 26, 28).

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[2] This quotation and the others on this page, relating to the order of the Oregon Circuit Court on September 17, 1956, are taken from the opinions of those courts which accompanied petitioners' motion to suppress (R. 21–28) and which were made a part of the affidavit of petitioners' counsel (R. 17, 18).

B. THE EVIDENCE AT THE HEARING

1. At a four-day hearing (April 9–12, 1957) on the petitioners' motion to suppress in the federal criminal prosecution, it was shown that William Langley, the district attorney for Multnomah County, Oregon, had received reports that "in the bootlegging establishments and houses of prostitution controlled by Elkins and Clark there were peepholes in which there were placed moving-picture cameras and that these moving-picture cameras were used to take the pictures of the activities of various customers in these places" (R. 55). On May 17, 1956, Brad Williams, a local reporter, came to Langley with substantially the same information and offered to put Langley in touch with Williams' source of information. While Langley listened on an extension, Williams telephoned the chief of police of St. Helens, Oregon, who told the reporter and Langley that petitioner Clark "was in the business of leasing and renting these moving pictures * * * and that these moving pictures were in—were kept in Clark's house" (R. 55–56). Herder also told Williams that Clark, who had been the police chief of St. Helens, had been discharged for stealing gas (R. 73). On this basis, Langley executed an affidavit alleging that, "upon information and belief," petitioner Clark possessed, in violation of state law, "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to Exhibit said photographs" (R. 20; see R. 53). The affidavit expressly identified the source of Langley's information as "Chief of Police Herder of St. Helens, Oregon" (R. 21). The state district court

issued a state search warrant on the basis of the affidavit and the warrant was executed that evening (R. 240, 404–405, 411).

In the course of executing the warrant, Deputy Sheriff George Minielly found, in addition to obscene wire recordings and phonograph records (R. 86, 249), five reels of recording tape (R. 240, 244–246). Although Minielly did not—in fact, could not—play the tapes to determine what they contained, there were notes accompanying the recordings (R. 248, 253). While the notes did not state explicitly that the recordings were of telephone conversations, they gave "a synopsis of what was contained in each tape" (R. 248). On the basis of all the information which he had, including that contained in newspaper reports, Minielly concluded that the tapes were recordings of telephone conversations (R. 248). Other officers found and seized spools of recording wire, phonograph records, a movie projector, a recording device, head phones and amplifying units, slot machines, and movie film to fit the projector (R. 258–260, 407–409). The tape recordings were turned over to Terry Schrunk, the sheriff of Multnomah County (R. 87–88).

2. After listening to the tape recordings, it appeared to Schrunk that they might involve a federal violation. On May 19 (Saturday) or 21 (Monday) 1956, Schrunk informed the local office of the Federal Bureau of Investigation of the existence of the recordings (R. 92–93, 100).[3] He also notified the

[3] Since Friday, May 18, 1956, was primary election day in Oregon, Saturday, the 19th, was the first business day after the search (R. 93, 99–100).

Oregon Attorney General and the telephone company (R. 93, 100). One of the tape recordings was played for F.B.I. Agent Ronald Sherk on May 22, 1956, at the sheriff's office (R. 122, 125–126). From the nature of the recording itself, it appeared to be a recording of telephone conversations taken directly from telephone wires. In Sherk's opinion, "they were recorded directly off the wire," since "there was little, if any, background noise in part of the conversations whereas there was considerable background or room noise in other parts * * *" (R. 193; see generally R. 148–149, 191–195). Sherk felt that he "had every reason to believe" (R. 193) that the other four reels contained similar conversations, for there were notes in each box listing the date and time of recording and the names of the persons whose conversations were recorded (R. 143–144).

Although the local and federal law-enforcement authorities cooperated to the extent that local officers would pass along information regarding possible federal crimes uncovered during the course of local investigations (R. 100–102, 105–106, 262), the federal authorities had nothing to do with this state search and had no prior knowledge that it was to be undertaken (R. 69–70, 79, 100, 102–104, 125–126). Joseph Santoiana, the F.B.I. agent in charge of the Oregon district, testified that "prior to May 17th, and including May 17, 1956, I had nor did my office any knowledge whatsoever of the raid that was going to be pulled off. We had no prior indication, no prior consultation, no prior advice. We had no indication it was going to be pulled off. * * * [T]he first

time that we had notice was when we read it in the local press" (R. 275–276; see R. 125–126).

3. In the state court, the magistrate who had issued the warrant, a state district court judge, held a three-day hearing on petitioner Clark's motion for return of the seized property and its suppression as evidence, beginning on May 21, 1956. Chief of Police Herder of St. Helens, Oregon, was permitted to testify and denied giving any information to district attorney Langley (R. 22–23, 410).[4] The state court judge, however, did not permit the state to present any evidence or make any argument, so that neither Langley nor Williams testified at the state court hearing (R. 23–24, 60, 412). On May 22, 1956, before the state district court decided petitioners' motion, a state grand jury indicted petitioners for the state offense of wire tapping (R. 26, 68–70).

On May 29, 1956, the state district court held that, since Langley's affidavit stated that it was based primarily on information and belief, it was invalid on its face and therefore did not justify the issuance of the search warrant (R. 24). He directed the suppression of the fruits of the search as evidence, but did not order their destruction (except for twenty-six slot machines) or return. Instead, the state judge

[4] At the hearing in federal court on petitioners' motion to suppress, Herder admitted telling Williams, the newspaper reporter, that petitioner Clark possessed obscene pictures and records. He claimed, however, that his information came from two deputy sheriffs who had worked under petitioner Clark when Clark had been chief of police at St. Helens, and that in his telephone conversation with Williams he (Herder) had made it clear that his information was hearsay (R. 72–79).

ordered that the seized property be "impounded in the possession of the Sheriff of Multnomah County, to be held and released only upon the direction of the Attorney General of the State of Oregon or such higher circuit or Supreme Court before whom the matter may be heard" (R. 24; see R. 412–414).[5]

4. The federal search warrant was issued and executed by Agent Sherk on September 5, 1956 (R. 2–3, 187–188). Agent Sherk's affidavit, on the basis of which the federal warrant was issued, was also made on September 5, 1956. Sherk stated in his affidavit that he had personally listened "to portions of electronic tape recordings of conversations, which recordings contained intercepted telephone conversations" on May 22, 1956, and had personal knowledge of the location of the tapes (R. 1).

It was shown at the hearing in the federal district court that Agent Sherk also had other information at the time the affidavit was executed, apart from that learned by listening to one of the tapes and reading the accompanying notes. One of the recorded conversations purported to be a telephone conversation involving Langley. About May 28, 1956, Agent Sherk talked to Langley and learned that he had not given permission for the interception (see R. 1, 158–159). As to the location of the tapes, it was shown that on August 13, 1956, Sherk went to the bank in Milwaukie, Oregon, with Captain Gurdane and Lieutenant Cross of

[5] On April 26, 1956, the Governor of Oregon had ordered the state Attorney General to take charge of, and investigate conditions in, Multnomah County (R. 23, 26). Petitioners' case was presented to the state grand jury at the direction of the Attorney General (R. 68).

the Oregon state police. Sherk was permitted to view the five tapes, kept in a deposit box (R. 155–156, 174–178, 185).*

C. THE RULING ON THE MOTION

The United States Attorney took the position at the hearing on the federal motion to suppress that the legality or illegality of the state search under state law was immaterial, since there had been no federal participation in the search. He said: "we would not desire to redress the State processes and mark it as illegal in our view. It is a litigious question * * *. I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal" (R. 80). Nevertheless (as we have set forth above) defense counsel offered the testimony of a great many witnesses to show all of the facts relating to the state and federal warrants and the state and federal searches.

On April 12, 1957, at the close of the hearing on the motion to suppress, the trial judge ruled that the tape recordings and other items were admissible in the federal trial since "there is no evidence in this case which this Court can find that special agent Sherk * * * or any other agent of the United States had any knowledge or information or suspicion of any kind that this [state] search was being contemplated or was eventually made by the State officers

*Gurdane and Cross were the custodians designated by the Attorney General of Oregon (R. 235–237, 263, 265–268).

until they read about it in the newspaper" (R. 284). Since the evidence was thus admissible under the so-called "silver platter" doctrine, the judge declined to decide whether Agent Sherk made a legal search under a valid federal search warrant issued on an affidavit establishing probable cause (R. 278–279).

III

THE STATE INJUNCTION

On April 11, 1957, near the conclusion of the hearing on the federal motion to suppress, federal subpoenas were issued directing George Minielly, Terry Schrunk, Vayne Gurdane, and Claude Cross "to appear in the United States District Court for the District of Oregon * * * on the 16th day of April, 1957, at 11 o'clock A.M. to testify in" the present case (R. 415, 418–419). That same day, a federal subpoena was issued directing William Langley to appear and testify in this case on April 17, 1957 (R. 421). All of these subpoenas were "issued on application of the U.S." (R. 415, 419, 421).

On April 15, 1957, the day before the federal trial began, the Oregon Circuit Court for Multnomah County, in a civil suit filed by the petitioners, entered a temporary restraining order specifically enjoining George Minielly, Terry Schrunk, Oscar Howlett, Claude Cross, Vayne Gurdane, and William Langley (and other named persons who did not subsequently testify at the federal trial), as well as "all other State and County officers or officials having knowledge of this order", from giving testimony at the peti-

tioners' federal trial with respect to any matter "concerning the alleged illegal search and seizure of May 17, 1956, in the premises of the plaintiff Clark" and "the items allegedly illegally seized in said search" (R. 303, 424).[7]

The state court's order was presented to the federal trial judge at the opening of the petitioners' trial on April 16, 1957. He ruled that "the order just read so far as it attempts to interfere with the process of this Court here before issue [*sic*] is void and is a nullity and of no force and effect" (R. 309). In an oral opinion (R. 309–322), elaborating upon his reasons for this ruling, the trial judge stated that state and federal courts each must work in their separate spheres and that the state court had no right to attempt to control the federal proceeding by purporting to enjoin the testimony of federal witnesses, most of whom had been subpoenaed before issuance of the temporary restraining order (R. 415, 419, 421). While the trial court was of the opinion that there need not have been any conflict between the state and federal court in this case (R. 312), "when they come in irreconcilable conflict Federal judiciary must pre-

[7] The petitioners' suit in the state circuit court had been dismissed as to witness Howard R. Lonergan (a deputy district attorney for Multnomah County, who subsequently testified at petitioners' federal trial) on the petitioners' own motion (R. 302–303, 379). At trial, petitioners conceded that Lonergan was "technically correct" in saying that the state restraining order did not apply to him (R. 384–385). The witness James C. Darby (a member of the Oregon state police force, who also testified at the federal trial) was not named as a defendant in the state injunction suit (R. 301–302, 394).

vail under the [supremacy clause of the] basic constitution" (R. 322).[8]

The tape recordings and other paraphernalia which the petitioners had unsuccessfully sought to have suppressed were admitted in evidence at their trial (Govt. Ex. 1–5; R. 324–328, 331, 346–347, 353, 357, 359, 361). In accordance with the trial judge's ruling that the state court's injunction was invalid, eight officers and officials of the State of Oregon and Multnomah County who had been involved in the state search and seizure, or in the state legal proceedings following the search, or in the custodianship of the disputed evidence—and who had been specifically enjoined from testifying by the state court (George Minielly, Terry Schrunk, Oscar D. Howlett, Claude F. Cross, Vayne Gurdane, and William Langley) or who, petitioners claimed, otherwise came within the scope of that injunction (Howard R. Lonergan and James C. Darby)—were directed to and did testify (R. 365–367, 369–372, 374–377, 378–380, 388–389, 393–394, 394–396, 397).

IV

THE DECISION OF THE COURT OF APPEALS

The court of appeals, affirming petitioners' convictions, held that the lawfulness of the state search and

[8] During the course of the federal trial, petitioners sought a stay of proceedings in the Court of Appeals for the Ninth Circuit to enable them to petition for a writ of prohibition forbidding the federal trial judge from compelling the giving of testimony by the state officers named in the state court's restraining order (R. 286–294). The Ninth Circuit denied the application for a stay on the ground that a writ of prohibition could not be issued, since petitioners' remedy, if any, was by way of appeal (R. 304–306).

seizure of May 17, 1956, need not be considered, since the evidence clearly showed that no federal officer participated in it, and that the federal search and seizure of September 5, 1956, conformed to federal standards (R. 456–458).[9] The court therefore rejected petitioners' contention that the testimony of the state officials and the tape recordings themselves were inadmissible, although it noted that it need not have reached this question, since petitioners had failed to comply with the court's rules relating to the presentation of claimed trial errors (R. 458).

SUMMARY OF ARGUMENT

I

The federal district court and the court of appeals did not decide whether the state search was conducted under valid search warrants since they held that the legality of the state search was immaterial under the "silver platter" doctrine. The federal district court also did not consider it necessary to decide the validity of the federal warrant. The court of appeals, however, at petitioners' urging, held that the warrant was sufficient and that petitioners had no standing to raise the issue since the property was no longer theirs after it passed into the state's control. While the district court did not pass on the validity of the state search or the federal search, petitioners were permitted to,

[9] The court also pointed out that petitioners had no standing as to the issue of the lawfulness of the federal seizure, since the property seized was not in petitioners' custody or possession, actual or constructive, at the time, and they had no proprietary interest in the property (R. 457).

and did, show all the facts relating to these searches. The relevant facts are therefore before this Court.

A. The state search was valid under the Fourth and therefore, *a fortiori,* under the Fourteenth Amendments.

1. District Attorney Langley, after listening to a telephone conversation in which Herder, the chief of police at St. Helens, Oregon, described petitioner Clark's illegal activities, made an affidavit, on information and belief, alleging that Clark possessed property which Clark intended to use in violation of state law. It was inherently probable that Herder would be in a position to know of petitioner Clark's activities, since Clark had been the former chief of police at St. Helens, Oregon, and had been discharged for misconduct. And Herder's information was corroborated by information gleaned from other sources.

In federal practice—consistent with the Fourth Amendment—a search warrant is issued on the basis of probable cause. Probable cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient * * * to warrant a man of reasonable caution in the belief" that an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162. Langley's affidavit, which fully and fairly set forth the source and nature of his information, would have been adequate under these standards for the issuance of a federal search warrant under the Fourth Amendment. Certainly, then, it also satisfies the requirements of the Fourteenth Amendment.

2. Since the search warrant was valid, Deputy Sheriff Minielly entered petitioner Clark's residence as one properly entitled to do so. While engaged in a lawful search, he came upon electronic tapes and notes indicating that the tapes were recordings of telephone communications. As such, the tapes constituted property used to violate state law—and, with the recordings on them, fruits of crime as well.

This Court has held that a law-enforcement officer who has lawfully entered the premises may seize both "the instrumentalities and means by which a crime is committed" and "the fruits of crime." *Harris* v. *United States*, 331 U.S. 145, 154. And, although the search warrant did not specify tape recordings as the object of the search, the officers had the right to seize property related to other crimes which in good faith they happened to come upon. *Id.* at 153–155.

B. The state search and seizure were valid under Oregon state law.

1. An authoritative determination as to the validity of the state search under state law may be made in the proceeding which is being begun by District Attorney Langley to vacate the state injunction. As of this time, however, such a determination has never been made. Under Oregon law, if the seized property was used, or may be used, to commit a crime, the magistrate makes a return to the court of general jurisdiction—here, the circuit court—and holds the property subject to the higher court's order. The magistrate's order thus looks forward to another,

more definitive, proceeding. This was exactly the effect of the state district court order of May 29, 1956, which left the tape recordings subject to the order of the state Attorney General and the higher state courts. The determination of the state circuit court is likewise not final because, as an interlocutory order in state criminal case, it was not appealable by the state.

But even if the state circuit court's decision was final, it would not be binding on the federal court in determining whether the evidence was illegally obtained. *Res judicata* and collateral estoppel do not apply since the United States was not a party to the state court determination. And the circuit court's decision is not controlling as an interpretation of state law, since the federal courts in determining state law are not bound by courts of local jurisdiction—particularly when, as here, the determination of the local court appears to be in conflict with the decisions of the highest state tribunal.

2. Oregon, like federal, law provides that search warrants must be based upon probable cause. Probable cause has been defined, for Oregon purposes, as the existence of such circumstances as would lead a reasonably prudent man to believe in the guilt of the accused person. In *State* v. *Hoover,* 347 P. 2d 69, decided November 25, 1959, the Supreme Court of Oregon has indicated that information received from an identified reliable source constitutes sufficient probable cause under Oregon law for the issuance of a valid search warrant.

3. The state warrant, according to Oregon law, was directed toward the seizure of particular items which the warrant alleged had been used, or were intended to be used, to effect a state criminal offense. Just as under federal law, the rule in Oregon is that a police officer who comes upon the instrumentalities of a crime while executing a valid search warrant has both the right and duty to seize the offending property, even though it is not named in the warrant.

C. The property validly passed from state to federal custody.

1. Under state law the petitioners are not entitled to the return of property used to commit a crime even if the use of the property as evidence is suppressed. Petitioners therefore have no interest in the transfer of custody as between the state and federal government. In fact, the federal warrant was itself a valid basis for the admission of the evidence.

2. The federal warrant was, ~~in any event,~~ valid. Although the federal district judge did not rule on the validity of the federal warrant, he allowed petitioners to, and they did, make full inquiry into the basis and extent of the F.B.I. agent's knowledge in executing the affidavit for the federal warrant. The court of appeals thus acted on a full record when, at petitioners' invitation, it passed on the merits of the federal search and concluded that the federal warrant was entirely proper.

The record shows that F.B.I. Agent Sherk, when he made his affidavit, had probable cause to believe that the tapes had been used to intercept telephone

conversations, and that the purpose of the interception was to use the conversations in a way to violate federal law. Sherk had listened to one of the tapes which intrinsically evidenced that it was a recording of a telephone conversation made by interception, and had read the notes accompanying the other tapes. He had talked with one of the participants to a recorded telephone conversation and learned that the interception was not authorized. He knew precisely where the recordings were stored. And his affidavit sets forth the operative facts with clarity and in detail.

II

Even if the search and seizure by the state officers were illegal under the Fourteenth Amendment, the admission of the evidence seized was nevertheless proper under the "silver platter" doctrine. And if the seizure was illegal only under Oregon state law, the admissibility of the evidence is even more clear. Not only does the rationale of the silver-platter doctrine apply, but there is little reason for the federal courts to be enforcing especially restrictive state laws which interfere with federal law enforcement.

A. When the local state officials obtained and executed the state warrant, they were acting to redress a violation of state law. No federal officers took part in, or did anything to instigate the state action. The federal officers did not even have prior knowledge that the state search was going to take place. Thus, the evidence in this case was, in the terms of *Lustig* v.

United States, 338 U.S. 74, 79, "turned over to the federal authorities on a silver platter."

B. 1. In *Weeks* v. *United States,* 232 U.S. 383, this Court first enunciated a rule suppressing evidence obtained by an unreasonable search and seizure by federal officers. In the same case, the Court held that it was not error to permit the use in a federal trial of property improperly seized by state policemen, since they had not acted under any claim of federal authority. This decision has been followed by numerous decisions of this Court. To the extent these cases, and particularly *Weeks,* rested on the inapplicability of the Fourth Amendment to state action, their rationale is weakened by *Wolf* v. *Colorado,* 338 U.S. 25. But the numerous subsequent decisions of almost all the courts of appeals demonstrate that the actual holding of *Weeks* is still applicable, although the rationale of the rule has changed.

2. The rule of exclusion is itself a rule of practicality. It is a judicial sanction adopted by this Court as an effective way to enforce the right of privacy against incursion by federal officers. As such, it is essentially disciplinary in character, and is not a necessary requirement of the Fourth and Fourteenth Amendments.

3. The disciplinary character of the exclusionary rule accounts for, and justifies, the silver-platter doctrine. First, as this Court emphasized in *Wolf,* public opinion can much more readily exert itself against illegality on the part of local, than federal, officers. Therefore, a disciplinary rule to control

state officers is no more needed and constitutionally required in federal courts than in state courts.

Second, the only officers that federal courts can effectively control are federal officers. If an unlawful search or seizure was not participated in by federal officers, a rule of exclusion in the federal courts would not tend to preserve the right of privacy embodied in the Fourth and Fourteenth Amendments. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations by an exclusionary rule in the federal courts. On the other hand, an exclusionary rule would mean that state officers, whether inadvertently or deliberately, could interfere seriously with federal prosecutions. Thus, balancing the importance of protecting individual freedom with the needs of an ordered society, the silver-platter doctrine is still justified. The doctrine merely recognizes that exclusion is not a remedy sufficiently efficacious to deter all acts of official misbehavior, and that the federal prosecution ought not to be curtailed when the deterrent aspects of exclusion are so tenuous as to be wholly speculative.

4. Petitioners argue that a rule of admissibility in federal courts would promote subterfuge and evasion on the part of state and federal officers. If the rule is used as a means of evasion, that can best be dealt with as it occurs, rather than by adopting an inflexible rule of exclusion. There are no facts in this case to support any suggestion of evasion.

The argument that the federal courts somehow ratify illegality when they admit evidence illegally

obtained by state officers is not well founded. The rule of exclusion is applied, not because admission of the evidence implies approval or ratification, but because federal exclusion effectively serves to keep federal law enforcement within proper bounds. The most that the federal court can undertake to do is to make certain that its own officers—federal officers—conduct law enforcement activities within proper limits.

Also, the federal government ought not to discriminate between the minority of states which have the exclusionary rule and the states which do not, or which like Oregon are undecided, so long as the states are free to adopt their own methods of protecting the right of privacy. Since the states are not obliged to adopt a rule of exclusion by the Fourteenth Amendment, federal courts should not be required to go beyond ascertaining that the property is in state custody, particularly when the state is not obliged to return it. That would be more in keeping with this Court's traditional avoidance of intrusion in the administration of criminal law by the states in the absence of congressional command or state trenching upon the requirements of due process.

C. If, contrary to our contentions, the silver-platter doctrine is rejected, this Court could adopt a flexible standard. Such a standard would consider the nature of the illegality by which the evidence was obtained and distinguish between deliberate or serious infractions and those which are inadvertent and comparatively minor. A flexible standard could be deemed ap-

propriate since the silver-platter doctrine applies to a factual situation (state officers and a federal court) which stands between that involved in *Weeks* (federal officers and a federal court) and in *Wolf* (state officers and a state court).

Here, the state officers attempted to comply with federal and state law by obtaining a search warrant from a magistrate. And the illegality, if any, was certainly not clear or serious. Considering these circumstances and the fact that the exclusion of evidence would interfere with federal law enforcement without effectually disciplining state officers, the evidence here was properly admissible under any standard attempting to balance the rights of the individual and the valid interests of society as a whole.

III

The validity of the state court order restraining state and local officers from testifying in petitioners' federal trial is immaterial on review of petitioners' federal convictions. In any event, the injunction was invalid.

A. The validity of the state injunction is immaterial because it ran neither to the federal court nor the prosecution. The state and local officials who were bound by it, even if it were valid, testified at petitioners' trial. Whether or not the witnesses were in contempt of the state court cannot affect petitioners' federal convictions.

B. 1. When the state circuit court judge entered his temporary restraining order, he knew that the

federal trial was to begin the following day and that the federal case depended upon the testimony of state officials named in the restraining order. Petitioners objected to the testimony of eight government witnesses at trial on the ground that the restraining order barred their testimony. All had already been subpoenaed by the federal government before the restraining order was entered, or, both petitioners and the state court knew, were likely to be subpoenaed shortly. The conflict between state and federal courts in this case thus did not result from the course of variant proceedings in the two courts. Instead, the conflict was deliberately brought about by petitioners and the state court, through an attempt to interfere with federal process in a federal criminal case.

2. In *Ableman* v. *Booth*, 21 How. 506, this Court held that, although the state was sovereign within its territorial limits, that sovereignty was limited by the Federal Constitution. Therefore, the sphere of action appropriated to the United States is beyond the reach of state courts and state process. The supremacy of the federal government in its proper sphere of action means that its judicial processes must be equally paramount in authority in carrying out federal laws.

The right of federal courts and federal process to be free of interference by state courts and state officers has received continuing recognition to the present day. State legislatures and state governors cannot nullify federal court orders, even by indirect interference. State courts cannot refuse to give effect to a valid federal statute simply because it affects

their rules of court practice, even though the converse is not true. A state judge cannot legally thwart a federal subpoena calling for production of, or access to, state voting records. It is the federal court which has statutory power to stay state court proceedings to protect its own jurisdiction, not the reverse.

3. The doctrine of comity concerns itself with the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other by avoiding interference with each other's process. *Ponzi* v. *Fessenden,* 258 U.S. 254, 260. Had this doctrine been allowed full play in this case, the state court would have refused to restrain state officers whose testimony was relevant to the federal prosecution, without ever reaching the question of its lack of power because of overriding federal sovereignty. It was the state court which interfered with federal process, not the reverse. Of course, the federal court could decline to insist upon its exclusive right to determine the issues of the federal case, but it is not bound to do so.

4. There is not one word in *Rea* v. *United States,* 350 U.S. 214, suggesting that its rule—that a federal injunction may issue to prevent a federal agent from delivering illegally seized contraband in the custody of a federal court to a state court, and to prevent the federal agent from testifying about the illegal search in a state court—is an avenue designed for two-way traffic. All of the decisions by this Court regarding the supremacy of federal judicial process refute that contention. It is the state court which is subject to federal limitations, not the reverse.

ARGUMENT

INTRODUCTION

The evidence, the admissibility of which is under attack, came into federal custody on September 5, 1956, pursuant to a federal warrant addressed to the bank which held the evidence in custody for the Attorney General of the State of Oregon. While petitioners' motion to suppress in the federal court did attack the federal warrant as based on an insufficient affidavit (R. 14), the main thrust of the motion, and of the hearing thereon, was that the evidence had illegally been obtained by state officials because the state search was based on an insufficient state warrant. All that the federal district court found it necessary to decide on the motion to suppress was that the federal government had obtained the property from the state without having in any way participated in the means by which the state obtained that property (R. 278–286). It did not undertake to decide one way or another whether the state warrant was valid under state or federal law. The district court also did not deem it necessary to decide whether the affidavit which supported the federal warrant was sufficient (R. 278–279). The court of appeals, however, at petitioners' urging, did pass on the latter question, finding that the affidavit supporting the federal warrant was sufficient and that petitioners had no standing to raise the question since the property was no longer theirs after it passed into the control of the state.

The courts below did not undertake to decide the validity of the state warrant and seizure because, under the so-called "silver platter" doctrine, they con-

sidered it immaterial to determine whether the property had come validly into state hands, so long as the federal government did not participate in the state search and seizure. While, we submit, the decision below can be supported on that basis alone, the whole delicate question of federal-state relationships that is involved in the "silver platter" doctrine need not be reached, if, as we contend, the state search and seizure were valid under state and federal law. Although the federal district court did not pass on the validity of the state search, petitioners were permitted to show all of the facts relating to it at the hearing on the federal motion to suppress, and they took full advantage of the opportunity. As to this aspect of the case, they called and examined Langley (the district attorney of Multnomah County, who made the affidavit on which the search was issued), Minielly (the deputy sheriff who led the searchers and actually found the tape recordings), Schrunk (the sheriff of Multnomah County to whom Minielly gave the recordings), Herder (the chief of police of St. Helens, Oregon, who supplied the information on which Langley's affidavit was based), Howlett (the deputy district attorney who represented the state at the magistrate's hearing in the state district court), Lonergan (a deputy district attorney), and Cross and Gurdane (the Oregon state policemen who deposited the tape recordings with the Milwaukie, Oregon, bank). In addition, exhibits showing the various state proceedings were introduced. Thus, the relevant facts are before this Court on this record. Hence, this conviction should not be set aside without

a determination of the validity of the manner by which the evidence was obtained.

While two lower Oregon state courts have considered the issue of the state search and seizure, and have decided it contrary to our position here, these decisions do not finally and authoritatively decide this question. A recent decision of the Oregon Supreme Court, *State* v. *Hoover*, 347 P. 2d 69, decided November 25, 1959, after the grant of certiorari in this case, offers strong support for our view that the state warrant and search at issue here are valid under Oregon law. We have been advised that, on the basis of that decision, District Attorney Langley has filed a motion to vacate the temporary restraining order and related orders entered by the circuit court for Multnomah County in the civil suit for injunction brought by petitioners. This motion may lead to a final order and eventually to a decision by the Oregon Supreme Court which would be authoritative for state purposes.

For these reasons, we discuss first, as does petitioner, the validity of the search and seizure by the state. We show that there has as yet been no authoritative decision on that issue, and that the state warrant and seizure are valid by federal and state standards. We also show that the property validly passed from state to federal custody.

If we are correct in this initial argument, the validity of the "silver platter" doctrine need not be reached. If it is reached, it is our position that this doctrine is a desirable one in our federal system and should be retained.

Finally, we discuss the effect of the state court restraining order. We believe that this order has no bearing one way or the other on the issues discussed above, and no bearing on the validity of petitioners' conviction. Moreover, we submit that the state court injunction was an improper interference with federal process in violation of the supremacy clause of the Constitution.

I

THE EVIDENCE WAS LAWFULLY OBTAINED

Since the "silver platter" doctrine made the legality of the state search and seizure immaterial on the issue of the introduction of the seized evidence in a federal court, the government, during petitioners' federal trial, neither claimed that the search and seizure was valid nor admitted its invalidity (see *supra*, p. 11). Similarly, the federal district court did not determine this issue (see *supra*, p. 27). Nevertheless, at petitioners' initiative, the relevant facts were fully developed in the present record on the federal motion to suppress (see *supra*, pp. 6–11) and are extensively argued by petitioners in their brief before this Court. The government, as respondent, may therefore properly support the judgment below on the ground that the evidence was lawfully obtained.

A. THE STATE SEARCH WARRANT AND STATE SEIZURE WERE VALID UNDER THE FEDERAL CONSTITUTION

1. *The warrant.*—District Attorney Langley, after listening to a telephone conversation between Reporter Williams and Herder, the chief of police of St. Helens, Oregon, made an affidavit on information and belief,

alleging that petitioner Clark possessed property which Clark intended to use in violation of state law. See Ore. Rev. Stat., section 167.150. Langley identified the source of his information as the chief of police, surely a source of information whom Langley could reasonably believe to be reliable. Moreover, Langley could reasonably believe that Herder would be in a position to know of Clark's activities, since Clark had been the former chief of police of St. Helens, and had been discharged for misconduct. And Herder's information was corroborated by similar information Langley gleaned from other sources (see *supra*, p. 6). While Herder testified at the state district court hearing and at the federal hearing on the motion to suppress that he had told Williams and Langley that his information was hearsay heard from deputy sheriffs who had served under Clark, this was contradicted by Langley at the federal hearing.[10] Moreover, even on Herder's version, information from deputy sheriffs who worked under a particular person would be information on which a prudent man could reasonably rely.

In federal practice—which is consistent with the Fourth Amendment—the commissioner is entitled to issue a warrant if probable cause exists. Rule 41(c), F.R. Crim. P. "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians,

[10] Langley was not permitted to testify at the state hearing (R. 23–24, 60).

act." *Brinegar* v. *United States,* 338 U.S. 160, 175, quoted in *Draper* v. *United States,* 358 U.S. 307, 313. Hence, probable cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162, quoted in *Brinegar* v. *United States, supra,* 338 U.S. at 175–176, and *Draper* v. *United States, supra,* 358 U.S. at 313.

In *Draper* v. *United States, supra,* this Court held that hearsay information relating to a specific offense, communicated to a federal agent by a reliable informant, was sufficient to give the officer probable cause for an arrest without warrant. Here, the informant was just as reliable, and the information equally specific. Beyond that, Langley's information was set forth in an affidavit and a state search warrant was obtained. Thus, far from constituting himself the sole judge of the question of whether probable cause existed to make a search, Langley fully and fairly set forth the source and nature of his information in an affidavit and invoked proper state procedures in obtaining state process. The Langley affidavit would thus have been adequate to constitute probable cause for the issuance of a federal search warrant under the Fourth Amendment. Certainly, then, it also satisfied the requirements of the Fourteenth Amendment.

2. *The search and seizure.*—Since the state search warrant was valid, Deputy Sheriff Minielly entered petitioner Clark's residence as one properly entitled to

do so. He was not a trespasser upon Clark's premises, even though a measure of force was required to effect that entry. The search warrant empowered him to seize motion pictures and accompanying sound recordings. When he came upon the tape recordings, he did not know their nature and had no way of determining upon the spot the nature of their contents, since he did not know how to operate a tape recorder (R. 253). But Minielly also found notes inside the boxes containing the tapes. The notes, while not specifically descriptive of the tapes as recordings of intercepted telephone conversations, gave a synopsis of the contents of each tape, including the date and time of the interception, and the names of the participants in each conversation. When coupled with information which Minielly had obtained from newspaper sources, these notes gave Minielly cause to conclude that the recordings were recordings of telephone communications (see *supra*, p. 7). As such, the tapes constituted property used to violate state law—with the recordings on them, were fruits of crime as well (see Ore. Rev. Stat., section 165.540)—and were therefore subject to seizure.

This Court has frequently held that an officer who has lawfully entered the premises, may seize both the "instrumentality and means by which a crime is committed" and "the fruits of crime." *Harris* v. *United States*, 331 U.S. 145, 154; see, *e.g.*, *Marron* v. *United States*, 275 U.S. 192, 199; *Agnello* v. *United States*, 269 U.S. 20, 30. Thus, the Court has not limited the right of seizure to material which is contraband in itself. The check involved in *Zap* v.

United States, 328 U.S. 624, the checks in *Harris*,[11] and the books of account in *Marron* were on their face less clearly offending than these tapes, which, as marked, were fairly known to be the direct fruits of the crime of wiretapping. The seizure, as well as the search, was therefore lawful.[12]

While the search warrant did not specify tape recordings as the object of the search, the officers had the right to seize instrumentalities or fruits of another crime which they happened to discover. The evidence shows that the search was made in good faith for the property specified in the warrant, and was not a general exploration. In similar circumstances, where officers were lawfully on the premises incident to a valid arrest, this Court held that law-enforcement officers need not ignore material related to other crimes which they came upon. *Harris* v. *United States, supra,* 331 U.S. at 153–155; see also *Kelly* v. *United States,* 197 F. 2d 162, 164 (C.A. 5); *United States* v. *Braggs,* 189 F. 2d 367, 369 (C.A. 10). While these cases involved the seizure of property possession of which is itself a crime, *i.e.*, contraband, there is no reason to distinguish such property from the instru-

[11] These checks were the object of the search in *Harris*, but were not discovered. The Court stated that, if they had been found, they would have been subject to seizure. 331 U.S. at 154.

[12] No valid objection to the warrant arises from the fact that only obscene phonograph records, and no obscene motion pictures, were found during the search. *Harris* v. *United States, supra; Steele* v. *United States No. 1,* 267 U.S. 498, 504; *United States* v. *Fitzmaurice,* 45 F. 2d 133, 134–135 (C.A. 2). "The search must be judged by the situation as disclosed before it was made, not by what turns out to be the truth; just as the event cannot support the search, so it cannot invalidate it." *United States* v. *Fitzmaurice, supra.*

mentality of an offense. Both types of property are subject to seizure pursuant to a search warrant which specifies them as the object of the search. And both should be equally subject to seizure when the searching officers happen to come upon them during a good-faith search, even though the search is directed to a different offense.[11a]

B. THE STATE SEARCH WARRANT AND STATE SEIZURE WERE VALID UNDER OREGON LAW

The principles which govern the validity of the state search and seizure at issue in this case are substantially identical under Oregon law with those under the Fourth Amendment discussed above (pp. 31–35). We therefore submit that the state search

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[11a] We also suggest that, even if, contrary to our contentions above, the search and seizure were inconsistent with the Fourth Amendment (if they had been carried out by federal officers), nevertheless the Fourteenth Amendment may not embody the Fourth Amendment in its entirety. Thus, in *Palko* v. *Connecticut*, 302 U.S. 319, 325, Mr. Justice Cardozo stated that only those rights which are "of the very essence of a scheme of ordered liberty" and are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," are included within the Fourteenth Amendment. Whether a search or seizure which would violate the Fourth Amendment always constitutes a violation of the Fourteenth Amendment has not been decided by this Court. See *Wolf* v. *Colorado*, 338 U.S. 25, 27–28 ("The security of one's privacy against arbitrary intrusion by the police—which is at the *core* of the Fourteenth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."); *Frank* v. *Maryland*, 359 U.S. 360, 365–366 ("While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the *extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment* are of course not restricted within these historic bounds" (emphasis added)).

and seizure were also valid under Oregon constitutional, statutory, and decisional law. But, even if contrary to our belief, the State of Oregon restricts the right of law-enforcement officers to search and seize more narrowly than is required by the Federal Constitution, we contend, nonetheless, that the state search and seizure involved here were valid under such standards.

1. *The decisions of the state district and circuit courts.*—Although the Oregon Supreme Court may ultimately decide the validity of the state search in the proceeding begun by District Attorney Langley to vacate the state injunction (see *supra*, p. 29), as of now there is no final, authoritative decision of this issue in the state courts.

Under Oregon law, district courts have limited jurisdiction over certain classes of misdemeanors. Ore. Rev. Stat., sections 3.150, 46.040, 51.040, 51.050, 164.430, 166.120, 166.130. Judges of these local courts are also magistrates, and, when sitting as such, are entitled to issue warrants of arrest and search warrants for property, including property which has been used, or which is intended to be used, to commit a crime. *Id.*, sections 46.050, 133.030, 133.110, 141.010, 141.040, 141.060. After the search warrant is executed, a return is made on the warrant to the magistrate, who may hold a hearing and take testimony if the person from whose possession the property was taken controverts the grounds for issuing the warrant. *Id.*, sections 141.100, 141.130, 141.160. If the property seized was used, or may be used, to commit a crime, the magistrate retains it subject to the order

of the court of general jurisdiction—in this case, the circuit court—and makes a magistrate's return of all the documents to that court. Ore. Const., Article VII (Orig.), section 9; Ore. Const., Article VII, section 2; Ore. Rev. Stat., sections 141.170, 141.190. The magistrate's order thus looks forward to another, more definitive proceeding. This was exactly the effect of the state district court order of May 29, 1956, which left the tape recordings subject to the order of the state Attorney General and the higher state courts (see *supra*, pp. 4–5, 9–10).

The state circuit court has likewise made no final determination. Without taking additional evidence, the circuit court issued an interlocutory order in connection with the state criminal case. It therefore was not appealable by the state. Ore. Rev. Stat., sections 138.020, 138.060; *State* v. *Minnick*, 33 Ore. 158, 54 Pac. 223; cf. *Carroll* v. *United States*, 354 U.S. 394.

Even, however, if the state circuit court's decision were final, it would not be binding on the federal court in determining whether the evidence was illegally obtained. *Rios* v. *United States*, 256 F. 2d 173, 175–176 (C.A. 9), certiorari granted on other grounds, No. 52, this Term. The principles of *res judicata* and collateral estoppel do not apply since the federal government was not a party to the state court determination. Restatement, *Judgments*, §§ 78d, 93. Nor is the circuit court's conclusion controlling as an interpretation of state law since the federal courts, in determining state law, are not bound by state courts of local, rather than state-wide, jurisdiction. *King* v. *Order of Travelers*, 333 U.S. 153, 158–162. The determination of

a local court, such as the county circuit court here, is certainly not conclusive evidence of state law, particularly when it is in conflict with the decisions of the highest state court (see *infra*, pp. 38–41).[13]

2. *The warrant.*—Article I, section 9, of the Oregon Constitution provides that no search warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. Section 141.030 of the Oregon Revised Statutes substantially repeats the constitutional command. And probable cause, for Oregon purposes, was defined in *State* v. *Duffy*, 135 Ore. 290, 295 Pac. 953, 957, as "the existence of such circumstances which would lead a reasonably prudent man to believe in the guilt of the accused party. * * *"

Recently, in *State* v. *Hoover*, 347 P. 2d 69, 74–75, decided November 25, 1959, the Supreme Court of Oregon, although dealing with a search without a warrant, indicated that information received from an identified, reliable source constitutes sufficient probable cause under Oregon law for the issuance of a valid search warrant. In that case, a cruising police officer observed an automobile double-parked in front of a local tavern and signaled its occupants to proceed. As the automobile moved away, two men who had been talking to its occupants ran over to the police

[13] Moreover, the circuit court's determination was not based on all the evidence introduced in the federal district court. The state district court refused to allow the state to offer any evidence and the circuit court decided the issue without hearing any further testimony (*supra*, pp. 9, 37).

cruiser and told the officer that a person in the automobile had threatened them with a revolver. The policeman pursued the automobile, stopped it, ordered the defendant to get out, and conducted a brief search of the vehicle, during the course of which he found a revolver. The Oregon Supreme Court held that the search was incident to a valid arrest and that, even assuming that the search preceded the arrest, they were so closely related in time and circumstance as to be reasonable. *Id.* at 75–79. In determining the validity of the police officer's arrest, the court necessarily had to pass upon the question of whether information received from other persons may constitute sufficient probable cause to justify an arrest or search. As to that issue, the state court said (*id.* at 75):

> Certainly there is no constitutional barrier to a search based upon information alone. * * *
>
> * * * * * *
>
> Some cases hold that upon facts as strong or stronger than in our own case mere information supplied by a third party is not enough to justify an arrest without warrant. * * * But other cases, with which we agree, hold that under proper circumstances mere information may be enough. * * *[14]

[14] Thus, the court, in effect, overruled the statement in *State* v. *Quartier*, 114 Ore. 657, 664, 236 Pac. 746, 748, that "[a]n affidavit on information and belief is not sufficient * * *." And this holding in *Hoover* is directly contrary to the basis of the state district court's decision here—that the warrant was invalid because it was based primarily upon information and belief only (R. 24)—which was apparently accepted by the state circuit court (R. 25).

The reasoning of *State* v. *Hoover, supra,* supports the sufficiency of the affidavit in this case as a basis for the issuance of a search warrant. Surely, the source of District Attorney Langley's information—the chief of police of St. Helens, Oregon—could more reasonably be believed to be reliable than the informants in *State* v. *Hoover,* who apparently were not known to the officer who made the search. See 347 P. 2d at 72. Moreover, Police Chief Herder was in a particularly good position to know of petitioner Clark's activities. In addition, Langley's information was corroborated by similar information he had otherwise obtained (see *supra,* p. 6).

3. *The search and seizure.*—Under Oregon law, the officers were justified in using necessary force to effect their entry under a valid search warrant. Ore. Rev. Stat., section 141.110. This warrant (R. 2–3), consistent with Ore. Rev. Stat., section 141.010, was directed toward the seizure of particular items which the warrant alleged had been used, or were intended to be used to effect a state criminal offense. And, just as under federal law, the general rule in Oregon is that a police officer, who comes upon the instrumentality of a crime while executing a valid search warrant, has both the right and the duty to seize the offending property, even though it is not named in the warrant. *State* v. *Muetzel,* 121 Ore. 561, 564, 254 Pac. 1010, 1011. Thus, an officer who comes upon the instrumentality of another crime in the course of his official duties need not close his eyes to it. So long as he is engaged in a lawful activity

when he uncovers the offending property, he is entitled to seize it. Here, Deputy Sheriff Minielly lawfully entered petitioner Clark's residence for another purpose, and while searching in execution of that lawful purpose came upon property which was both used to commit a state crime and was the fruit of that crime. That property, the tape recordings and related items, was subject to immediate seizure.

C. THE PROPERTY VALIDLY PASSED FROM STATE TO FEDERAL CUSTODY

1. Whether the property came into the hands of the state validly or invalidly, petitioners have no right to the return of it since the tape recordings were both the instrumentalities and direct fruits of a crime and would not be returned to petitioners, even if suppressed as evidence. As noted above (pp. 36-37), Oregon law provides for the retention of property used or intended to be used to commit a crime. Thus, both state courts, the district court and the circuit court, even though they found the seizure invalid, nevertheless placed the property in the custody of the Attorney General rather than return it to petitioners. Since the state had lawful custody of the property, the transfer of custody as between state and federal governments, and the means whereby the transfer was effected, were of no concern to petitioners any more than the transfer between state and federal governments of custody of a prisoner (who obviously has an interest in his own person) is a matter of which a prisoner can complain. *Ponzi* v. *Fessenden,* 258 254.

The property came into federal possession under a search warrant duly issued by a federal judicial officer upon an affidavit executed by FBI Agent Sherk upon the basis of his personal knowledge. Since, as we have shown, the property was, in effect, contraband and was in the lawful custody of the state, and since there was no illegality in the manner whereby Agent Sherk obtained the knowledge set forth in his affidavit, the allegedly tainted means by which the state officers obtained the property should not preclude the use of Agent Sherk's knowledge as a basis for the federal warrant. We show below that the personal knowledge set forth in his affidavit was sufficient probable cause for issuance of the warrant. (See *infra*, pp. 44–45). Hence, as the court of appeals held, the federal warrant was itself a valid basis for the admission of the evidence.

2. Petitioners argue (Pet. Br. 91–96) that the trial court did not permit them, at the hearing on their motion to suppress, to make full inquiry into the basis and extent of Agent Sherk's knowledge in executing the affidavit for the federal warrant, ruling instead that this issue was immaterial because the evidence was admissible under the "silver platter" doctrine. In these circumstances, petitioners claim, it was error for the court of appeals to sustain the conviction on the independent ground that the search and seizure under the federal warrant were valid.

In claiming that their inquiry was in fact curtailed, petitioners rely upon the federal trial court's statement, during the course of the federal hearing on the motion to suppress, that "This Court doesn't care

from here on out whether he [Agent Sherk] ever executed an affidavit for a search warrant" (R. 201; Pet. Br. 15, 94). Petitioners, however, do considerably less than full justice to the federal trial judge, for their quotation was not the end of this colloquy. Instead, the following exchange later took place between defense counsel and the court (R. 201):

> Mr. CRAWFORD. Then, I take it it would be useless for me to establish any further evidence with that objection [that the federal warrant was invalid] in view?
>
> The COURT. You may make your record.
>
> Mr. CRAWFORD. May I make my record?
>
> The COURT. To protect your theory about it.

Thereafter, defense counsel completed his examination of Sherk, continuing to probe into the circumstances surrounding the issuance of the federal search warrant among other matters (R. 202–205). When all of the facts are considered—including the fact that defense counsel had questioned Sherk at considerable length about his personal knowledge regarding the tape recordings before the remark now relied upon by petitioners was made (R. 120–134, 142–159, 174–195)—it is apparent that the trial judge meant, and defense counsel understood him to mean, that defense counsel was entitled to inquire fully as to the sources of Sherk's knowledge. The court was only making clear that it did not intend to rule, one way or another, on the validity of the federal search.

Since the facts were fully developed, petitioners' argument that the court of appeals ought not to have passed on the validity of the federal search is with-

out merit. Moreover, having pressed the issue as to the validity of the warrant in the court of appeals (R. 457–458), the petitioners are in a poor position to put that court into error for considering it. Petitioners' present argument (Pet. Br. 95)—which reduces itself to the proposition that the court below should have passed on the merits of the federal search only if it concluded that the search was invalid—is not persuasive. In any event, if the issue is important (as we do not believe it is), the facts on which to determine the validity of the federal warrant were before the court of appeals and are now before this Court.

3. The record shows that the federal warrant was entirely proper. The affidavit upon which the federal warrant was based was drawn so as to show affirmatively that the affiant, Agent Sherk, executed the affidavit on the basis of personal knowledge, and it set forth the operative facts with clarity and in detail. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 486. At the time when Agent Sherk made the affidavit, he had listened to a tape recording seized as one of a group of five. That recording intrinsically showed that it was a recording of a conversation made by breaking into the telephone line itself. Sherk had examined the notes found in the boxes containing the other four tapes, and those notes listed the time and date of recording and the names of the persons whose conversations were recorded. He had also talked with one of the participants to a recorded telephone conversation and learned that the interception had not been authorized. On August 13, 1956, Sherk had been

permitted to view the tapes, so he knew precisely where they were to be found (see *supra*, pp. 8, 10–11). Surely, then, when Sherk made his affidavit, he had probable cause to believe, on the basis of personal knowledge, that the electronic tapes had been used to intercept telephone conversations, and that the purpose of those interceptions was to use the conversations in such a way as to involve violations of federal law.

Petitioners suggest (Pet. Br. 93) that Sherk's affidavit was invalid because his knowledge was stale, since he did not make the affidavit until some three weeks after last viewing the tapes. There is no flat requirement that the affidavit must be made and the search warrant obtained within a certain time after personal knowledge is acquired. Lower federal courts have upheld as valid affidavits based on facts obtained as much as nineteen to twenty-one days before the affidavit or search had been made. *Nuckols* v. *United States*, 99 F. 2d 353, 355 (C.A. D.C.), certiorari denied *sub nom. Floratos* v. *United States*, 305 U.S. 626; *United States* v. *Fitzmaurice*, 45 F. 2d 133, 134 (C.A. 2); *Hefferman* v. *United States*, 50 F. 2d 554, 556 (C.A. 3). Moreover, the facts are stronger here, since the cases cited involved situations—liquor and beer held for sale, and gambling violations—which could easily change during an extended period. In this case, the tape recordings were in a safe deposit box in the custody of state authorities, were not held for sale, and were property of a kind unlikely to deteriorate.

II

EVIDENCE OBTAINED BY STATE OFFICERS PURSUANT TO A DEFECTIVE STATE WARRANT IS ADMISSIBLE IN A FEDERAL CRIMINAL TRIAL, WHERE NO FEDERAL OFFICER PARTICIPATED IN, OR HAD PRIOR KNOWLEDGE OF, THE ILLEGAL STATE SEARCH [15]

If this Court finds, contrary to our contentions above (pp. 31–35), that the state search warrant was defective under the Fourteenth Amendment, we submit that the evidence seized was nevertheless properly admitted at petitioners' trial because it was obtained by state officers enforcing state law without participation by, or without even the prior knowledge of, federal officers. In other words, we urge the continued applicability of the so-called "silver platter" doctrine. If, on the other hand, the Court concludes that the state search was consistent with the Fourteenth Amendment, but illegal under Oregon law (on the ground that, contrary to our contention, Oregon law more narrowly restricts searches and seizures by law-enforcement officers than does the Federal Constitution), we believe that the admissibility of this evidence at petitioners' trial is even more clear. Not only does the rationale underlying the silver-platter doctrine apply (see *infra*, pp. 49–67), but there is little reason for the federal courts to be enforcing especially restrictive state law. The exclusion of probative evidence in this situation would be subordinating the important federal policy in punishing law

[15] Our argument as to the "silver platter" doctrine runs not only to this case, but also to *Rios* v. *United States*, No. 52, this Term—set for argument immediately following this case.

offenders in the federal government's own courts to the special policy of a particular state. Moreover, exclusion would require the federal courts to decide intricate and often novel questions of state law in an area—law enforcement by state officers—of particular sensitivity in the federal system.

A. THE STATE SEARCH AND SEIZURE WERE MADE BY LOCAL POLICE ACTING IN A LOCAL MATTER, WITHOUT AGREEMENT WITH, OR PARTICIPATION BY, FEDERAL OFFICERS

When District Attorney Langley executed his affidavit and obtained a search warrant, he was acting to redress a violation of state law. It is a crime under Oregon law to possess obscene photographs and sound recordings with intent to exhibit them (Ore. Rev. Stat., section 167.150), and Langley believed that petitioner Clark was committing, or intended to commit, this local offense. And when Deputy Sheriff Minielly made the search, he was looking for the items named in the search warrant, not for evidence of a federal crime.

As petitioners admit (R. 13–14),[16] no federal officers took part in the search and seizure, nor did they have any prior knowledge that the search was going to take place. The fact that the search took place first came to their attention when they read about it in a public newspaper. Although there was a common understanding on the part of Sheriff Schrunk's office that evidence of violations of federal law would be turned over to the appropriate federal authorities

[16] It is for this reason that petitioners ask the Court to overrule the silver-platter doctrine in its entirety (Pet. Br. 46–47).

when uncovered by state officers in the course of their investigations, the sheriff's office operated completely independently of the federal agencies. And there was no prior understanding that evidence procured in the course of this particular search would be made available to the federal government. No federal law-enforcement agency came into the picture until several days after the search, when Schrunk notified the local F.B.I. office, as well as other interested parties (see *supra*, pp. 6–8).

Where there is a showing of collusion or actual participation in their official capacities between federal and local authorities (*Lustig* v. *United States*, 338 U.S. 74, 78–79; *Irvine* v. *California*, 347 U.S. 128, 136; *Byars* v. *United States*, 273 U.S. 28, 33; *Burdeau* v. *McDowell*, 256 U.S. 465; *Fowler* v. *United States*, 62 F. 2d 656 (C.A. 7)), or where state officers act solely to enforce federal law (*Gambino* v. *United States*, 275 U.S. 310, 313, 316–317; *United States* v. *Butler*, 156 F. 2d 897 (C.A. 10)), the action of the local officers must conform to Fourth Amendment standards if evidence obtained by them is to be admissible in federal courts. Here, however, there is not only no showing of such participation, but not even any showing of knowledge of the seizure by federal officers until long after it had occurred. See *Graham* v. *United States*, 257 F. 2d 724, 727–728 (C.A. 6); *Anderson* v. *United States*, 237 F. 2d 118, 123–124 (C.A. 9); *United States* v. *Moses*, 234 F. 2d 124, 125–127 (C.A. 7); *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 921; *Fredericks* v. *United States*, 208 F. 2d 712, 714 (C.A. 5), certiorari denied, 347 U.S.

1019; *United States* v. *Pugliese*, 153 F. 2d 497, 499 (C.A. 2). The evidence in this case was, in the words of *Lustig* v. *United States, supra*, 338 U.S. at 79, "turned over to the federal authorities on a silver platter."

B. EVIDENCE OBTAINED BY LOCAL OFFICERS ENFORCING LOCAL LAW WITHOUT FEDERAL PARTICIPATION IS ADMISSIBLE IN A FEDERAL COURT EVEN IF ILLEGALLY OBTAINED

1. *The judicial precedents.*—In *Weeks* v. *United States*, 232 U.S. 383, this Court enunciated, for the first time, a rule suppressing evidence obtained by an unreasonable search and seizure by federal officers. But in that same case the Court held that it was not error to permit the use in a federal trial of papers and property improperly seized by state policemen for "it does not appear that they acted under any claim of Federal authority * * *." *Id.* at 398. A few years later in *Center* v. *United States*, 267 U.S. 575, the Court again held, in a *per curiam* opinion, that evidence seized wrongfully by state officers is nonetheless admissible in a federal court.[17] In *Byars* v. *United States*, 273 U.S. 28, 33, Mr. Justice Sutherland, for a unanimous Court, said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

And in *Feldman* v. *United States*, 322 U.S. 487, 492, Mr. Justice Frankfurter, speaking for the majority, stated that "incriminating documents * * * secured

[17] The opinion relied on *Burdeau* v. *McDowell*, 256 U.S. 465, which upheld the admissibility, in a federal court, of evidence wrongfully acquired by a private person.

by state officials [in an illegal search and seizure] without participation by federal officials but turned over for their use are admissible in a federal prosecution." [18]

To the extent that these cases, and particularly *Weeks,* suggest that the limitations of the Fourth Amendment apply only to federal action, their rationale is weakened by the holding in *Wolf* v. *Colorado,* 338 U.S. 25, that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable search and seizures by state officers. The actual holding of the *Weeks* and subsequent cases, however—that evidence obtained by state officers acting on their own is admissible in federal courts even if the state officers acted improperly—was not affected by the *Wolf* decision. This is shown by the fact that, at the same time it decided *Wolf,* this Court decided *Lustig* v. *United States,* 338 U.S. 74, where it held inadmissible certain evidence obtained by state officers because it found that there was federal participation in the search. The whole discussion of federal participation was irrelevant, if it followed necessarily from *Wolf* that the illegal action by the state officers *ipso facto* rendered the evidence inadmissible. Therefore, since *Lustig,* as well as before, the silver-platter

[18] The issue actually before the Court was whether incriminatory testimony elicited from a witness in a state proceeding under a state immunity statute could be used against him in a subsequent federal trial without violating the Fifth Amendment. The statement quoted above, however, was necessary to the decision, since the Court reasoned by analogy from the Fourth to the Fifth Amendments. 322 U.S. at 490–492.

doctrine has been accepted as controlling in numerous decisions by the courts of appeals of seven circuits.[19]

Although it was suggested in *Benanti* v. *United States*, 355 U.S. 96, 102, fn. 10, that this Court's adherence to the silver-platter doctrine is an open question, the holding in that case does not bear on that rule. In *Benanti*, state officers obtained "leads"

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[19] *United States* v. *Benanti*, 244 F. 2d 389, 392–393 (C.A. 2), reversed on other grounds, 355 U.S. 96; *Manning* v. *United States*, C.A. 5, decided January 21, 1960; *Kendall* v. *United States*, 272 F. 2d 163, 165–166 (C.A. 5); *West* v. *United States*, 259 F. 2d 868 (C.A. 5); *Grimes* v. *United States*, 234 F. 2d 571 (C.A. 5); *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 924; *Burford* v. *United States*, 214 F. 2d 124 (C.A. 5); *Fredericks* v. *United States*, 208 F. 2d 712 (C.A. 5), certiorari denied, 347 U.S. 1019; *Serio* v. *United States*, 203 F. 2d 576 (C.A. 5), certiorari denied, 346 U.S. 887; *Scotti* v. *United States*, 193 F. 2d 644 (C.A. 5), affirming 102 F. Supp. 947 (S.D. Tex.); *Graham* v. *United States*, 257 F. 2d 724 (C.A. 6); *Brown* v. *United States*, 255 F. 2d 400 (C.A. 6); *Ford* v. *United States*, 234 F. 2d 835 (C.A. 6), certiorari denied, 352 U.S. 972; *Collins* v. *United States*, 230 F. 2d 424 (C.A. 6); *United States* v. *Camara*, 271 F. 2d 787, 789 (C.A. 7), now pending on petition for a writ of certiorari, No. 605 Misc., this Term; *Frierson* v. *United States*, 223 F. 2d 255 (C.A. 6), certiorari denied, 350 U.S. 970; *United States* v. *Moses*, 234 F. 2d 124 (C.A. 7); *United States* v. *White*, 228 F. 2d 832 (C.A. 7); *United States* v. *Stirsman*, 212 F. 2d 900 (C.A. 7); *United States* v. *Haywood*, 208 F. 2d 156 (C.A. 7); *Costello* v. *United States*, 255 F. 2d 389 (C.A. 8), certiorari denied *sub nom. Cannella* v. *United States*, 358 U.S. 830; *Jones* v. *United States*, 217 F. 2d 381 (C.A. 8); *Loxiena* v. *United States*, 177 F. 2d 919 (C.A. 8); *Anderson* v. *United States*, 237 F. 2d 118 (C.A. 9); *Williams* v. *United States*, 215 F. 2d 695 (C.A. 9); *Jaroshuk* v. *United States*, 201 F. 2d 52 (C.A. 9); *Parker* v. *United States*, 183 F. 2d 268 (C.A. 9); *Symons* v. *United States*, 178 F. 2d 615 (C.A. 9), certiorari denied, 339 U.S. 985; *Euziere* v. *United States*, 266 F. 2d 88 (C.A. 10); *Gaitan* v. *United States*, 252 F. 2d 256, 258–259 (C.A. 10), certiorari denied, 356 U.S. 937; *Gallegos* v. *United States*, 237 F. 2d 694 (C.A. 10); *contra*, *Hanna* v. *United States*, 260 F. 2d 723 (C.A. D.C.).

by wiretapping, made an arrest and seizure, and turned the fruits of the seizure over to federal authorities, all without participation by federal officers. State police officers who testified at the federal trial admitted that they had obtained their "leads" by wiretapping, and the words of an intercepted message were disclosed to the trial judge and defense counsel. The Court held that this situation was not analogous to a case where an illegal search and seizure is made by state officers and that the federal anti-wiretapping statute (47 U.S.C. 605) itself forbade admission of the evidence, since the disclosure in the courtroom of the intercepted communication, coupled with the earlier interception, was itself another violation of the statute (355 U.S. at 102):

> Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law, *in this case in a federal court*. [Emphasis added.] [20]

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[20] The Court's further statement—that "we do not mean to imply that an out-of-court violation of the statute would not also lead to the invalidation of a subsequent conviction" (355 U.S. at 102, note 9)—does not detract from our contention that *Benanti* is not controlling even by analogy. Under the anti-wiretapping statute any use of intercepted messages constitutes a criminal offense. Therefore, the use of the message, whether in or out of court, would be a violation of the statute. On the other hand, in a situation involving the silver-platter doctrine, the obtaining of the evidence is improper, but not its use. Thus, in the instant case, only the state, not federal, officers could possibly be guilty of violating the Federal Constitution or Oregon law.

2. *The rationale of the silver-platter doctrine.*—The continued adherence of the courts of appeals to the silver-platter doctrine, despite a partial change in its rationale, suggests that the rule has its roots in practical realities which continue although theories may change. Cf. *Hawkins* v. *United States,* 358 U.S. 74, 79; *Weiler* v. *United States,* 323 U.S. 606, 610. We submit that these realities continue to justify the rule now, just as much as before *Wolf* was decided.

a. As this Court has consistently held, the exclusionary rule is not a necessary requirement of the Fourth Amendment. The right of privacy protected by the Fourth Amendment is entitled to protection, but it does not follow that it must be protected by excluding illegally obtained evidence in every situation. Even though the Court decided in *Weeks* that an effective way to enforce the right of privacy against incursion by federal officers was to bar the evidence from a federal trial, it has consistently declined to compel the states to enforce the right in the same manner. In the very decision, *Wolf* v. *Colorado,* 338 U.S. 25, in which this Court held that the right of privacy protected by the Fourth Amendment against actions by federal officers was also protected against state incursion by the Fourteenth Amendment (*id.* at 27–28), it also ruled that state courts were not required to enforce the right of privacy by excluding evidence unlawfully obtained. This holding rested on the Court's conclusion that "[t]he Fourteenth Amendment does not forbid the admission of evidence ob-

tained by an unreasonable search and seizure." *Id.* at 33. The *Weeks* rule of exclusion "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication." 338 U.S. at 28; see *id.* at 39–40 (Mr. Justice Black concurring). See also *Stefanelli* v. *Minard,* 342 U.S. 117, 122; *Salsburg* v. *Maryland,* 346 U.S. 545, 554.

Consistent with *Weeks* and *Wolf,* the Court in *On Lee* v. *United States,* 343 U.S. 747, 755, held that the *Weeks* exclusionary rule went "beyond the requirements of the constitutional or statutory provision." Further, the Court stated (*ibid.*):

> In so doing, it has, of course, departed from the common law rule under which otherwise admissible evidence was not rendered inadmissible by the fact that it had been illegally obtained. *Such departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy.* * * * [Emphasis added.]

And Mr. Justice Jackson, in the principal opinion in *Irvine* v. *California,* 347 U.S. 128, again made clear that the exclusionary rule as a federal sanction was not required by the Fourth and Fourteenth Amendments. Therefore, he stated (*id.* at 134–135), the issue:

> Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is gov-

erned "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [21]

b. The decisions of this Court show that the rule of exclusion, as a rule of practicality, is essentially designed to have a disciplinary purpose. Thus, under *Weeks* the federal courts have undertaken to deter federal officers from violating the Fourth Amendment by preventing them from using the evidence unlawfully obtained. The essentially disciplinary nature of the exclusionary rule was made more clear in *Rea* v. *United States, supra,* 350 U.S. 214, which rejected the contention that "the only difference * * * between the *Wolf* decision and *Weeks* * * * is the difference between state and federal courts." *Id.* at 220 (dissenting opinion). Instead, the Court held that federal courts would so far control federal officers as to prevent them from turning evidence over to a state even though the state would thereby be effectively prevented from prosecuting the defendant for a violation of state law.

Similarly, in considering whether to require exclusion in state courts under the Fourteenth Amendment,

[21] In contrast, in other situations the Fourteenth Amendment, in and of itself, bars the admission of evidence in state courts. See *Spano* v. *New York*, 360 U.S. 315, 324; *Payne* v. *Arkansas*, 356 U.S. 560, 561, and the cases cited therein, holding that the Fourteenth Amendment bars the use in a state criminal trial of a coerced confession. And see *Rochin* v. *California*, 342 U.S. 165, 172, holding that the Fourteenth Amendment forbids the introduction of evidence in state courts obtained by conduct, such as forcible stomach pumping, which "shocks the conscience."

Mr. Justice Frankfurter, in *Wolf* v. *Colorado*, speaking for the Court, recognized that the answer depends upon whether exclusion is necessary to protect the right of privacy guaranteed by the Constitution: "[T]he immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure * * *". 338 U.S. at 28. He concluded that, since other remedies might be "equally effective" to enforce the requirements of the Due Process Clause against state officers,[22] the rule of exclusion was not required by the Federal Constitution in state courts. *Id.* at 31.

It is this disciplinary character of the exclusionary rule that accounts for, and justifies, the silver-platter doctrine. First, the state officers, and only the state officers, violated the Constitution in any situation in which the doctrine may be invoked. In *Wolf*, the Court pointedly stated that "[t]here are * * * reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under state or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." *Id.* at 32–33. There-

[22] Oregon, for example, provides both a criminal and a civil remedy for illegal searches. Ore. Rev. Stat., section 141.990; *Smith* v. *McDuffee*, 72 Ore. 276, 142 Pac. 558; *State* v. *Ware*, 79 Ore. 367, 155 Pac. 364.

fore, the Court concluded that, in view of the other remedies available, exclusion of evidence in state courts would not be constitutionally necessary to protect against unreasonable searches and seizures by state officers. Similarly, exclusion of evidence obtained illegally by state officers is not necessary in the federal courts.

Second, the only officers that the federal courts can effectively control are federal officers. If an unlawful search or seizure was not participated in by federal agents, a rule of exclusion in the federal courts would not tend to preserve the right of privacy embodied in the Fourth and Fourteenth Amendments. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations merely because the evidence of a federal crime which they occasionally happened upon was excluded in the federal courts. The effect of such a ruling would be to impede federal prosecution, and, more important, endanger society, without significantly furthering the judicial policy of discouraging future illegal intrusions on individual privacy.[23]

[23] Cf. the concurring opinion of Mr. Justice Jackson, joined in by Mr. Justice Frankfurter, in *Gallegos* v. *Nebraska*, 342 U.S. 55, 70:

"Even if we should assume that Texas officials coerced this confession, they were not acting at the request of Nebraska nor in any sense as her agent. Before we could reverse the conviction we would have to decide a question not heretofore answered in any decision that I recall, namely, whether Nebraska merely by admitting a coerced foreign confession in evidence would deny due process. Insofar as the reason for exclusion is to prevent convictions on coerced confessions, which

While an exclusionary rule applicable to evidence obtained by state officers would have little effect in enforcing the Fourth and Fourteenth Amendments, it could seriously interfere with effective and legal federal law enforcement. Such a rule would give persons over whom the federal executive has no control the power to decide when a federal prosecution could be brought. For example, consider the following situation: state officers searching improperly for stolen property, a state crime, find a counterfeiting apparatus which they seize. The building has been under surveillance by federal officers who have deliberately refrained from entering under a search warrant until all the members of the counterfeiting operation can be identified. If the crucial evidence seized could not be introduced in a federal trial, the state officers, whether deliberately or by inadvertence, would likely have immunized the suspects from federal prosecution. Thus, the considerations which led this Court in *Abbate* v. *United States,* 359 U.S. 187, to hold that a state prosecution could not bar federal prosecution

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are shown by legal experience to be intrinsically unreliable, I should suppose that any defect in its origin would adhere in the confession wherever offered. Insofar, however, as the reason for exclusion is to deter states from attempting coercion in order to bring about convictions, the reason would hardly apply to a case where a state of confession sought no conviction and the state of conviction did not seek the confession. But here there is no need to resolve such difficult questions * * * for I find no coercion * * * even if Nebraska be held to answer for the conduct of every official involved."

The illegal seizure of credible evidence, of course, does not render it unreliable.

apply in this field as well. State officers ought not to be given power to prevent, or, at least, seriously interfere with, federal prosecutions. Cf. *id.* at 195. Since federal courts cannot control state officers, they should not undertake to reject evidence because of any improper actions by state officers. That is the underlying reason for the silver-platter doctrine, and it has validity in the realities of our federal system.

This Court has held that application of the broad restraints of due process requires a balancing of the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests. *E.g.*, *Frank* v. *Maryland,* 359 U.S. 360, 363; *Spano* v. *New York,* 360 U.S. 315. If that is so of a constitutional principle, it is certainly true of a rule of judicial policy, especially since "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped." *Nardone* v. *United States,* 308 U.S. 338, 340; see *On Lee* v. *United States, supra,* 343 U.S. at 755. The balance has been found to favor exclusion from a federal trial of evidence obtained by federal misconduct. The concern of federal courts that law enforcement be conducted with due regard to private rights outweighs the public interest in criminal prosecutions. See *Irvine* v. *California, supra,* 347 U.S. at 136–137. But no proper balancing can result in an exclusionary rule where the judicial sanction of exclusion has no value, or little value, as a deterrent. When the assumed illegal search and seizure would have occurred in any event, no matter what the federal judicial policy may be, later exclu-

sion at a federal trial of the evidence obtained, with its resultant hampering effect on federal law enforcement, is not justified.

The special delicacy of the adjustment to be preserved between federal and state power has been an historic concern of the Court; thus, "[t]his Court with all its shifting membership has repeatedly found occasion to say that whatever inconvenience and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served by and protected by—two governments." *Knapp* v. *Schweitzer,* 357 U.S. 371, 380. Consistent with this view of the federal system, the states have been allowed a large measure of responsibility in law enforcement by this Court's deliberate refusal to interfere in the state administration of criminal law in the absence of congressional command or state trenching upon the requirements of due process. See, *e.g., Knapp* v. *Schweitzer, supra,* 357 U.S. at 378; *Mills* v. *Louisiana,* 360 U.S. 230; *Stefanelli* v. *Minard, supra,* 342 U.S. at 120; *Irvine* v. *California, supra,* 347 U.S. at 134; *Bartkus* v. *Illinois,* 359 U.S. 121, 124, 126, 138–139; *Abbate* v. *United States, supra,* 359 U.S. at 195. And in *Wolf* v. *Colorado,* the Court gave the states the responsibility to enforce proper investigation by their own officers. We submit that this responsibility should be left to the states, particularly when federal action would have little practical effect in protecting any constitutional right.

c. Petitioners' principal arguments (Pet. Br. 72–74) in favor of an exclusionary principle are that a rule of admissibility in federal courts would promote subter-

fuge and evasion on the part of state and federal officers, and that admission would be a ratification of the illegal state search by the federal courts. If the silver-platter rule is used as a means of evasion in a particular case, that can be dealt with as it occurs. There are no facts in this case to support any such suggestion (see *supra*, pp. 7–8, 47–49). State officers in Oregon and federal officials do cooperate to the extent of exchanging information regarding offenses within the other's jurisdiction, but that fact does not show collusion in misconduct. Is there evasion of federal standards when F.B.I. agents read of a state search in a daily newspaper? Or when a county sheriff discovers evidence of wire-tapping and notifies federal agents as well as the telephone company and the Attorney General of Oregon? If instances of collusion and perjury should occur, the federal courts are not so ineffectual as to be unable to protect the administration of justice in that specific instance without adopting a general and inflexible rule of exclusion. See, *e.g.*, *Mesarosh* v. *United States*, 352 U.S. 1, 14; *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124; *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 242–243.

The argument that the federal courts somehow ratify illegality when they admit evidence illegally obtained by state officers is also not well founded. The fundamental reason for a trial is the discovery of the truth. The rule of exclusion, however, does not bring out the truth; in its immediate impact on a particular case it suppresses truth. Hence the rule

of exclusion is applied, not so much because to admit the evidence implies ratification, but because federal exclusion effectively serves to keep federal law enforcement within proper bounds. The federal courts do not undertake to make certain that every bit of evidence that comes before them has been obtained with due observation of all the amenities by every person who might have relevant evidence. This was recognized by the Court in *Burdeau* v. *McDowell*, 256 U.S. 465. There, petitioner's employer, after discharging him, stole documents from petitioner's desk and safe and, after using them, turned them over to the government because they tended to show the commission of a federal offense. This Court held that the government need not surrender the documents to petitioner, stating (*id.* at 476):

> The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

Just as admission of the evidence in *Burdeau* did not mean exoneration or approbation of the employer's illegal acts, admission of evidence in the present situation does not exonerate the state officers or imply approbation of their actions. Admission of the evidence in a case involving illegal action by state officers merely means that the public interest in prosecu-

tion outweighs the benefit derived from application of an ineffective sanction. And just as the federal government need not take into account, or justify, the manner in which a private individual obtained evidence bearing on a crime, it ought not to have the burden of undertaking to justify the manner in which a state obtained evidence. The most that the federal courts can do is to make certain that its own officers—federal officers—conduct law enforcement activities within the limitations prescribed by the Constitution and by Congress. And arguments of ratification or condonation are relevant to that inquiry, if at all, only when federal officers are involved. See also *Feldman* v. *United States*, 322 U.S. 487, 492.[24]

Petitioners argue (Pet. Br. 84) that, since Oregon has an exclusionary rule applicable in its own courts, evidence illegally obtained by Oregon state officers should likewise be inadmissible in federal courts. Rule 26 of the Federal Rules of Criminal Procedure, however, contemplates "the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal Courts" regardless of their locality. Notes of Advisory Committee, Rule 26. Therefore, the federal courts should not differentiate between the minority of states which

[24] Mr. Justice Brandeis' famed dissent in *Olmstead* v. *United States*, 277 U.S. 438, rests in large measure on the proposition that the illegal action was taken by federal officers. *Id.* at 482. In fact, he stated, "The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress." *Id.* at 484. But see *Burdeau* v. *McDowell*, 256 U.S. 465, 476-477 (Justices Brandeis and Holmes dissenting).

have the exclusionary rule and those which do not, particularly so long as the states are free to adopt their own methods of protecting this right of privacy.[25]

In any event, the State of Oregon has never adopted the exclusionary rule. Although Oregon decisions seem to recognize the propriety of *filing* a motion to suppress evidence in connection with a pending criminal case,[26] the question has never been squarely presented for decision in that state. See Note, 35 Ore. L. Rev. 51, 52. As recently as *State* v. *Hoover*, *supra*, 347 P. 2d 69, 73, the Supreme Court of Oregon pointed out that "[t]he federal practice is to deny the use of such [illegally obtained] evidence", and that there was a dictum in an earlier Oregon decision saying

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[25] Petitioners say (Pet. Br. 68–69) that, in a state following the *Weeks* rule, the silver-platter doctrine means that illegally obtained evidence is barred from use in both state and federal courts in every situation except when state officers turn over such evidence to federal officers for use in federal courts. They then suggest that this exception to total exclusion is illogical. But the rules laid down in *Weeks* and *Rea* barring the use of evidence illegally obtained by federal officers in state or federal courts are the product of federal interest in disciplining the federal government's own officers (see *supra*, p. 55). In contrast, this Court has left the method used to discipline state officers to the states themselves. *Wolf* v. *Colorado*, *supra*. Thus, what method a particular state uses to discipline its own officers is not the concern of the federal courts and, conversely, the state's decision in favor of exclusion in its own courts does not logically require a similar result in the federal courts.

[26] See *State* v. *Quartier*, 114 Ore. 657, 661, 236 Pac. 746; *State* v. *McDaniel*, 115 Ore. 187, 192, 231 Pac. 965, affirmed on rehearing, 115 Ore. 234, 235, 237 Pac. 373; *State* v. *Christensen*, 151 Ore. 529, 531, 51 P. 2d 835.

that the same rule ought to be followed in Oregon. Nevertheless, the court continued (*ibid.*):

> [T]here [in the earlier Oregon case], as here, it was not necessary to reach the question. We have never been confronted with a case which has squarely demanded a decision to accept or reject the dictum of the Laundy case.[27]

The state circuit court, in its order of September 17, 1956, must have taken cognizance of the fact that Oregon Revised Statutes (see sections 41.910, it expressly declined to suppress the seized property in connection with the state criminal indictment for wire-tapping (R. 26). And the statement that the Attorney General of Oregon was not to use the wire-taps in any manner without first obtaining a court order specifically refers (R. 26) to provisions of the Oregon Revised Statutes (see sections 41.910, 141.720, and 165.540), which, taken together, provide that intercepted telephone communications shall not be used for any purpose without a prior court order.

Petitioners also suggest (Pet. Br. 69–72) that the history of the state and federal court actions in this case demonstrates that, far from promoting a healthy federalism, the silver-platter doctrine causes "a maximum of interference between state and federal courts, particularly in the many States that follow the Weeks rule." But, as shown above, Oregon cannot be said to be such a state. More important, it was petitioners' own actions—in attempting to inter-

[27] The dictum in *State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958, 975, said that the *Weeks* rule "ought * * * to be adopted."

fere with federal process and the federal courts by enjoining key government witnesses—which caused the apparent conflict. Furthermore, as we show below (pp. 72–85), the state injunction against the witnesses which initiated the alleged conflict was invalid under the Supremacy Clause of the Federal Constitution as it has been interpreted by this Court. Thus, petitioners can hardly claim that it is the silver-platter doctrine which caused the conflict, when the action of the state court is contrary to paramount law.

d. There are some instances of conduct by officers so illegal that this Court has held that admission of the fruits of the conduct in a state court would violate due process under the Fourteenth Amendment. *Rochin* v. *California,* 342 U.S. 165. Of course, as to such conduct, the fruits thereof would also be inadmissible in a federal trial. But neither this case nor *Rios* (No. 52, this Term) presents any such problem. In both cases, the invalidity of the state search is at most a debatable issue. In both, property which was both the instrumentality and the direct fruit of a crime (the instant case) or contraband (*Rios*) came into the hands of the state. Since the federal government had nothing to do with the manner in which the property was obtained by the state, the federal government ought to be able to use the property which the state has in its custody. In short, if a state retains property—and particularly when, as here and in *Rios,* it is validly retained—which constitutes probative evidence of a federal crime, the federal government ought to be able to use it.

C. IF THE "SILVER PLATTER" DOCTRINE IS REJECTED, THIS COURT COULD CONSIDER THE SERIOUSNESS OF THE IMPROPRIETY IN DECIDING WHETHER TO EXCLUDE EVIDENCE ILLEGALLY OBTAINED

As we have contended above, we believe that the silver-platter doctrine is supported not only by numerous judicial precedents, but by the rationale and practical consequences of the exclusionary rule. If, however, these arguments are rejected by this Court, we submit that, since the exclusionary rule is merely a rule of evidence not required by the Fourth Amendment, the Court under is supervisory powers could adopt a flexible rule under which the evidence seized here by the state officers, even if illegally obtained, could be properly admissible.

1. The situation involved here—the admission of evidence obtained by state officers in a federal court—stands logically between the *Weeks* and *Wolf* cases. Unlike in *Weeks*, the evidence was obtained by state not federal officers; unlike in *Wolf*, the evidence was admitted in a federal not a state court. As we have shown above (pp. 57–59), an exclusionary rule would not effectively deter unreasonable searches and seizures where state officers are involved since they are unlikely to be seriously concerned about the outcome of occasional federal prosecutions. For this reason, and the other reasons discussed above which support the silver-platter doctrine as a whole, we believe that, even if the court rejects that doctrine, it should not adopt the flat exclusionary rule which was appropriate and effective in the very different circumstances where the search and seizure were made by federal officers.

Instead of a flat or automatic exclusionary rule, we submit that, assuming the rejection of the silver-platter doctrine, the Court could, if it wished, adopt a standard which would consider the circumstances of the illegal search and seizure. In particular, evidence should not be barred which was obtained by state officers acting in good faith but mistakenly failing to comply with all the legal requirements. Only that evidence would be barred which was obtained by intentional or clear violation of constitutional rights. By this rule the Court could protect the right of privacy to the extent which any rule barring evidence in the federal courts is able to do with regard to the actions of state officers. On the other hand, the rule would interfere as litle as possible with the important interest of the federal government, and the country as a whole, in effective enforcement of federal law by not barring the use of evidence merely because the state officers erred in a comparatively minor way. Such a distinction between the types of violations is particularly appropriate where the effectiveness of the remedy of exclusion is doubtful at best.

This Court has often adopted flexible standards concerning the particular circumstances in deciding constitutional questions (see *supra*, pp. 59–60). Moreover, as we have shown (pp. 53–55), the rule of exclusion even with regard to federal officers is not a constitutional principle, but is rather one of judicial policy. It, therefore, follows that the Court can

adopt a flexible standard which would consider the practical needs of federal law enforcement as well as the necessity of protecting rights guaranteed by the Constitution.

That a flexible rule of exclusion is possible is demonstrated by the recent decisions of the Scottish High Court of Judiciary. Until 1950, that court allowed the admission of evidence even if illegally obtained. In 1949, however, in *Lawrie* v. *Muir*, [1950] Scots L.T.R. 37, the court held illegally seized evidence inadmissible but only under certain conditions. The court recognized the conflicting interest "of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities" and "of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any formal or technical ground." *Id.* at 39–40. In order to reconcile these two interests, the court concluded that a simple, absolute rule, while desirable, was not feasible. Therefore, the court decided to look to the circumstances of each case, barring evidence obtained by deliberate illegality on the one hand, but admitting evidence obtained by some lesser violation of the law on the other.

Considering the particular circumstances involved in *Lawrie* v. *Muir*, the High Court held the evidence

inadmissible. Shortly thereafter, in *M'Govern* v. *H. M. Advocate,* [1950] Scots L.T.R. 133, the court followed *Lawrie* v. *Muir,* although it again held the particular evidence inadmissible. But in *Fairley* v. *Wardens of the City of London,* [1951] Scots L.T.R. 54, 58, the High Court allowed the admission of evidence even though it was illegally obtained:

> * * * It follows that the procedure whereby the incriminating evidence was obtained was not strictly in accordance with any statutory or other authority. * * * I can find nothing to suggest that any departure from the strict procedure was deliberately adopted with a view to securing the admission of evidence obtained by an unfair trick * * *. [I]n the present instance the irregularity ought to be "excused" and the evidence admitted.

2. The situation involved here is the kind of case in which the evidence is properly admissible if a flexible standard is to be adopted. The state officers attempted to comply with the law by obtaining a search warrant from a magistrate. Nevertheless, the validity of the affidavit suporting the warrant has been challenged. While we believe that the search and seizure were valid under both state and federal law (*supra,* pp. 31–41), at the very least the action of the state officers was not intentionally or clearly unlawful. Considering the circumstances and the fact that the exclusion of evidence would interfere with federal law enforcement without effecitvely disciplining state officers, we submit that the evidence was

properly admissible under any standard attempting to balance the rights of the individual and the valid interests of society as a whole by excluding some but admitting other evidence.

III

A STATE COURT MAY NOT ENJOIN THE TESTIMONY OF WITNESSES SUBPOENAED TO APPEAR AND TESTIFY AT A FEDERAL CRIMINAL TRIAL

A. THE VALIDITY OF THE STATE COURT INJUNCTION IS IMMATERIAL TO PETITIONERS' APPEAL

The temporary restraining order issued by the Oregon circuit court, pursuant to a civil suit filed by petitioners, was directed to certain named persons and "all other State and County officers or officials having knowledge of this order" and prohibited them from giving testimony at petitioners' federal trial as to the search and seizure involved in this case (see *supra*, pp. 12–13). The federal trial court, however, held that the order was invalid and ordered eight state and local officials, including six specifically named in the state court's order, to testify. The officials obeyed the federal court's order.

It is clear that the state court order ran only to state and local officials. Therefore, when the officials testified in federal court, neither the court nor the prosecution was violating the order. Whether, on the other hand, the officials were violating the order depends upon whether the state court had authority to issue its order in the first place. But even if we assume, *arguendo*, that the state order was valid—and

therefore the federal court should not have ordered the witnesses to testify—this assumption merely means that the witnesses were in contempt. And even if the witnesses were, in fact, in contempt of the state court, this is hardly justification for reversing petitioners' convictions. In other words, whether or not the witnesses were in contempt is immaterial to the outcome of petitioners' appeal.[28]

B. THE STATE COURT INJUNCTION CONSTITUTED AN INVALID ATTEMPT TO INTERFERE WITH FEDERAL PROCESS IN A FEDERAL CRIMINAL CASE.

1. The original state injunction was issued on April 15, 1957, long after the evidence at issue here was in federal custody, and one day before the federal trial began. When the state circuit court judge entered his temporary restraining order he knew that the federal prosecution was at issue. In the very first sentence of his memorandum opinion of April 15, 1957, he noted that petitioners were "now being tried" in the federal court for a federal offense (R.

[28] After the state and local officials had testified at petitioners' trial, petitioners on May 10, 1957, moved in the state circuit court to cite seven of them for contempt (R. 434–438). The United States then brought an action on May 23, 1957, in the federal district court seeking and obtaining a temporary restraining order forbidding petitioners to prosecute their action in the state circuit court (R. 422–448). Petitioners can test the legality of the state court's original order forbidding the state and local officials from testifying, and the effect of their disobedience, either by appealing from the federal district court's ultimate determination in the suit brought by the United States on May 23, 1957, or by defending the action brought by District Attorney Langley in the state circuit court to vacate its original temporary restraining order forbidding him from testifying (see *supra*, p. 29).

295). Moreover, the state judge stated that "[t]he case against [petitioners] in the Federal District Court will be made by testimony of State officers * * *" (R. 296). Therefore, although the state judge expressed the view that his temporary restraining order would not interfere with the federal court (R. 300), he knew that the order, if given effect, would largely subvert the federal subpoena process in petitioners' case.

There is a sophism inherent in the statement made by the state court which issued the restraining order that the order did not really interfere with federal process because it left the state officers free to testify about everything except matters relevant to the federal prosecution—a contention repeated by petitioners (Pet. Br. 86). The argument seeks to justify emasculation of the federal process by pointing to the preservation of its shell. The state court had no authority whatsoever to attempt to limit the areas of testimony compellable from witnesses served with federal subpoenas.

Of the six witnesses named in the state temporary restraining order to whose testimony petitioners objected, five had been subpoenaed, on application of the government, to appear and testify at the federal trial before the state court's restraining order was filed (R. 415–416, 418–419, 421–423). Only one, Oscar Howlett (who testified for petitioners in connection with their motion to suppress), was served with the government's subpoena after the temporary restraining order naming him was entered, and he

was never served with the order extending the temporary restraining order beyond April 18, 1957, although he knew of the extension (R. 374–376, 416–417). The two other witnesses to whom petitioners objected at their trial were not specifically named in the order, and were not shown to be bound by it.[29]

In any event, even if the injunction had issued before the federal subpoenas and had been directed against all eight witnesses, still it seriously interfered with federal powers and a federal prosecution. Petitioners and the state circuit court knew that these eight witnesses would be relied on in large measure to prove the government's case. A state court cannot be allowed to cripple a federal prosecution merely by acting before the federal subpoenas are served.[30]

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[29] One witness, Howard Lonergan, was expressly exempted from the terms of the restraining order, and defense counsel at trial conceded that Lonergan was correct in stating that he was not bound by the order (see *supra* p. 13, fn. 7). Another, James Darby, was not specifically named in the temporary restraining order; if it purported to apply to him, it could only be on the basis that he came within the category set forth in the restraining order of "all other State and County officers or officials having knowledge of this order" (R. 303). Petitioners failed to establish that Darby knew of the restraining order before he was served with federal process in this case, although Darby knew of the order when he took the witness stand at the trial (R. 395). Lonergan and Darby were served with the federal subpoenas on April 29 and May 1, respectively (R. 417–418, 419–420).

[30] Petitioners contend (Pet. Br. 76, 78) that the validity of the injunction should not depend on whether it preceded or followed issuance of the subpoenas. We agree insofar as we believe that the state injunction would have been invalid even if it had preceded all the subpoenas. However, it is even more clear an interference with federal process because it came after most of the subpoenas.

The conflict between state and federal courts in this case did not result from the course of variant proceedings in the two courts. Petitioners specifically invoked the equitable powers of the state court, thereby deliberately inducing the conflict for the sole purpose of attempting to impede the federal criminal prosecution. Thus, there is no basis for the suggestion (Pet. Br. 76–78) that the district court or the government invited a "race of diligence" or promoted any unseemly jostling between a federal and a state court.[31] Rather, the facts inescapably show that the state court, through an equitable action, attempted to interfere with federal process in a federal criminal trial. This it cannot do.

2. This Court decided early that state courts may not interfere with the process of a federal court, even by the issuance of an extraordinary writ. In *Ableman* v. *Booth*, 21 How. 506—referred to in *Ponzi* v. *Fessenden*, 258 U.S. 254, 261, as "the great judgment"—the respondent was charged with a federal offense and, after a hearing by the United States commissioner, was held to answer at the next term of federal district court. The commissioner committed respondent to the custody of the United States marshal, until discharged by due process of federal

[31] It is hard to take seriously petitioners' statement that they were "rushed to trial" (Pet. Br. 77). The case was first set for trial on March 26, 1957, seven weeks after the indictment was returned. Petitioners obtained a continuance which delayed the trial until April 16, 1957. Of more significance is the fact that petitioners did not file their federal motion to suppress until March 25, 1957, forty-nine days after indictment (R. 13; see Pet. Br. 77).

law. Booth obtained an order by writ of *habeas corpus* in the Wisconsin courts that the federal marshal discharge him. This Court reversed, placing its decision squarely upon the Supremacy Clause of the Constitution.[32] It noted that the state was sovereign within its territorial limits, but that Wisconsin's sovereignty was limited by the Federal Constitution, and that "the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." 21 How. at 516. The supremacy of the federal government in its proper spheres of action meant that its judicial processes must be (*id.* at 517–518):

> equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States [to pass on federal supremacy], conflicting decisions would unavoidably take place, * * *. It was essential, therefore, to its very existence as a Government, that it [the federal government] should have the power of establishing courts of justice, altogether independent of State power, to carry

[32] In *United States* v. *Booth*, which was argued and decided with *Ableman* v. *Booth*, the same respondent had been indicted by a federal grand jury for the same offense with which he was charged before the commissioner. After trial, he was found guilty and sentenced to imprisonment and to pay a fine. The Supreme Court of Wisconsin again issued a writ of *habeas corpus*, concluded that the imprisonment pursuant to sentence was illegal, and ordered that Booth be discharged. In that case, the state court had gone a step farther and purported to exercise jurisdiction over a federal court's judgment.

> into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. * * *
>
> Accordingly, it [the paramount judicial authority] was conferred on the General Government, in clear, precise, and comprehensive terms [by the framers of the Constitution]. * * *.

Turning to the facts of the case before it, this Court agreed that a state court may issue process to determine upon what authority a person is imprisoned within the territorial limits of its state, but that once it is made known to the state court that the person is held under the authority of the United States, the state court can proceed no further. "[N]either the writ of *habeas corpus,* nor any other process issued under State authority, can pass over the line of division between the two sovereignties." 21 How. at 523. It was the clear duty of the federal marshal "to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government." *Id.* at 523–524.[33]

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[33] The decision in *Ableman* v. *Booth*, *supra*, was foreshadowed to a certain extent by a circuit court decision three years earlier in *Ex parte Robinson*, 6 McLean 355, Fed. Cas. No. 11,935. In that case, a federal commissioner issued a warrant for the arrest of a fugitive from labor who earlier had been adjudged to be a free person by an Ohio state court. The marshal to whom the federal warrant was issued arrested the fugitive and produced her for a federal hearing on the claim. While the hearing was adjourned pending determination, an

If, after the decision in *Ableman* v. *Booth,* there was any doubt as to the paramount right of federal courts and federal officers to be free from interference by state courts, that doubt could not have survived the decision in *Tarble's Case,* 13 Wall. 397. In the latter case, a state court commissioner issued a writ of *habeas corpus* to a recruiting officer of the United States to bring before the commissioner a person who had enlisted as a soldier in the army and whose discharge was sought on the ground that his enlistment was illegal. This Court held that the state judge had no jurisdiction to continue proceedings under a writ of *habeas corpus* after it was shown that the person whose discharge was sought was held by a federal officer under the authority, or the claim or color of authority, of the United States (*id.* at 407):

Ohio state court issued a writ of *habeas corpus* directing the federal marshal to bring his prisoner into the state court. The marshal refused to do so and was himself imprisoned by a county sheriff. The marshal sought *habeas corpus* in the federal court on the ground that he was illegally imprisoned by Ohio. Mr. Justice McLean, acting as circuit justice, discharged the marshal from state custody, saying that the state court had no power to interfere with the federal commissioner's hearing, even if it was assumed that the prior state adjudication that the fugitive was free was final, and that the federal arrest warrant for the fugitive was defective. *Id.* at 360–361. He noted that another court of the federal system could not have taken the action which the state court took, and that "a court of a different government could interpose in this form, is sanctioned by no law or precedent." *Id.* at 361–362. "That the Commissioner had jurisdiction in the case is clear. * * * It [the state court] wrested from him, without any authority of law, the subject of his jurisdiction. This, so far as I know, is without precedent." *Id.* at 365.

> Whenever * * * any conflict arises between the enactments of the two sovereignties [state and federal], or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. * * *
>
> Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. * * *

The right of federal courts and federal process to be free of interference by state judicial, legislative, or executive officers has received continuing recognition to the present day. State legislatures and state governors cannot nullify federal court orders, even by indirect interference. *Cooper* v. *Aaron,* 358 U.S. 1, 8–11, 18–19; *Sterling* v. *Constantin,* 287 U.S. 378, 397–398. State courts cannot refuse to give effect to an otherwise valid federal statute, simply because the statute affects their rules of court practice. *Adams* v. *Maryland,* 347 U.S. 179, 193; *Brown* v. *Walker,* 161 U.S. 591, 606–608. Yet the converse is not true, since it is for Congress and the federal courts to say what testimonial and real evidence is to be admitted in a federal criminal trial, not the state courts. Rule 26, F.R. Crim. P.; see *Funk* v.

United States, 290 U.S. 371; *Wolfle* v. *United States,* 291 U.S. 7, 12–13; *McNabb* v. *United States,* 318 U.S. 332, 341; *Lutwak* v. *United States,* 344 U.S. 604, 613–614. State courts may not refuse to provide a forum for the enforcement of a federal statutory right because the state court regards the federal statute as penal and has a policy of refusing to enforce penal laws enacted by legislatures other than its own. *Testa* v. *Katt,* 330 U.S. 386, 392–393; see *Claflin* v. *Houseman,* 93 U.S. 130, 137. With specific reference to the subpoena power of a federal court, no state court can legally thwart a federal subpoena calling for production of, or access to, state voting records. *In re Wallace,* 170 F. Supp. 63, 69–70 (M.D. Ala.). And, if driven to exercise the extreme of judicial power, it is the federal court which has the statutory authority to stay proceedings in a state court to protect its own jurisdiction, not the reverse. 28 U.S.C. 1651, 2283.[34]

3. The doctrine of comity concerns itself with "[t]he forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other * * *." *Ponzi* v. *Fessenden, supra,* 258 U.S. at 260, quoting

[34] The latter statute, like its predecessors, has received a relatively narrow construction so as to minimize federal court interference with state courts. See *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118; *Amalgamated Clothing Workers of America* v. *Richman Brothers Co.*, 348 U.S. 511. But the power of Congress to enact, and the power of federal courts to enforce, legislation permitting interference with state courts has not been successfully challenged.

from *Covell* v. *Heyman*, 111 U.S. 176. Had the doctrine of comity been allowed full play in this case, the state court would have refused to restrain state officers whose testimony was relevant to the federal prosecution without ever reaching the question of its lack of power. It was the state court which interfered with federal process, not the reverse. In short, comity as a doctrine dictating that federal and state courts must show due regard for each other's processes, insofar as it is compatible with federal supremacy to do so, furnishes another separate reason for concluding that the state court erred in attempting to restrain the testimony of state officials subject to federal subpoena.

Nothing said by this Court in *Ponzi* v. *Fessenden* respecting comity does violence to the principles of federal supremacy discussed above. In that case petitioner was sentenced to imprisonment by a federal court for violations of federal law. While serving his federal sentence and with the consent of the Attorney General, petitioner was taken on a state writ of *habeas corpus* into a state court and put to trial on state indictments. This Court held the federal system could permit this procedure as a matter of comity, but it also recognized that "[u]ntil the end of his [petitioner's federal] term and his discharge, no state court could assume control of his body without the consent of the United States." 258 U.S. at 261. In short, *Ponzi* was not concerned with whether the United States had the power to exercise exclusive jurisdiction over petitioner. That much was clear. Rather, the question was whether the United States, as a matter of comity,

could decline to insist upon the exclusiveness of its jurisdiction. The answer that the federal government could relinquish its exclusive jurisdiction has no application in this case. Here, the federal district court at all times insisted upon its exclusive right to determine the issues of the federal case.

4. Petitioners' almost complete reliance on *Rea* v. *United States*, 350 U.S. 214 (Pet. Br. 75, 78, 81–83, 86, 90), depends upon their assertion that the rule announced in *Rea* is "not one of supremacy but of comity" (Pet. Br. 84). Therefore, they argue, *Rea* applies to this converse situation where the evidence obtained illegally by state officer is to be introduced in a federal court.[35] We submit that this interpretation of the Court's holding is erroneous.

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[35] Moreover, despite petitioners' claim (Pet. Br. 81–83), the action of the state circuit court in attempting to enjoin the state and county officers from testifying at the petitioner's trial does not present the converse factual situation of that involved in *Rea*. Here, the federal prosecution was initiated, not by the offending local officers, but by federal officers; in *Rea*, the state prosecution was initiated on a complaint sworn to by the federal agent who had made the unlawful search and seizure which resulted in the federal court's order suppressing the evidence. Here, the state court attempted to enjoin testimony by state officers most of whom at the time were under federal subpoenas to appear in the federal prosecution; in *Rea*, it was not shown that the federal officer had been served with a state subpoena (see the Government's Brief, No. 30, O.T. 1955, p. 4). Here, the evidence was in the hands of federal officers pursuant to federal process and the federal trial was scheduled to begin the day after the restraining order was issued; in *Rea*, one of the avowed purposes of the complaint for injunction was to prevent physical transfer of the property and the state prosecution was not shown to be imminent (*ibid.*).

In *Rea* v. *United States* this Court, exercising its "supervisory powers over federal law enforcement agencies" (350 U.S. at 217), concluded that a federal injunction should issue to prevent a federal agent from delivering physical custody of illegally seized contraband to a state court, and to prevent the federal agent from testifying about the illegal search in that court. The basis of the Court's decision was (*ibid.*):

> To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them.
>
> * * * Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. * * *

There is not a single word in the decision even suggesting that it was based on the principle of comity. Nor is this surprising since the Court in effect refused to follow the rule of comity—that is, "[t]he forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, * * * by avoiding interference with the process of each other * * *." *Ponzi* v. *Fessenden, supra,* 258 U.S. at 260. The Court declined such forbearance because of the importance of protecting the right of privacy from illegal search and seizure by federal officers.

While the opinion in *Rea* does not mention the Supremacy Clause—which is not unusual for decisions that depend ultimately upon it—almost certainly

this Clause underlies the decision.[36] At the least, there is no suggestion in the opinion that its rule is an avenue designed for two-way traffic. And all the other decisions of this Court regarding the supremacy of federal judicial process (see *supra*, pp. 75–80) refute any contention that state courts may rely upon *Rea* for the proposition that state courts may, by injunction, interfere with federal process in order to try a collateral issue of evidence. We enjoy "a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other * * *." *Brown* v. *Allen*, 344 U.S. 443, 498 (Mr. Justice Frankfurter concurring). This case involves such a limitation, for it is the state court which is subject to federal limitations enforceable in a federal court, not the reverse.[37]

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[36] In fact, the quotation from *Rea* on pages 82–83 of petitioners' brief supports our view that the decision depends upon the Supremacy Clause and does not apply to evidence to be introduced in a federal court. Petitioners, by substituting "state" for "federal" and vice versa, have made the quotation inconsistent with the tenor of this Court's decisions establishing the supremacy of federal process.

[37] Moreover, the injunction issued by the state circuit court seems improper even under Oregon law. The decisions of the Oregon Supreme Court demonstrate that an injunction will issue to "stay the hands of the peace officers in enforcing criminal law * * *" (*American Federation of Labor* v. *Bain*, 165 Ore. 183, 216, 106 P. 2d 544, 558), only when the penal statute upon which the prosecution is founded is unconstitutional. Thus, every Oregon case which we have examined, including the most recent, has expressly required that the constitutionality of the statute or ordinance be placed in question before the court will consider a suit in equity to enjoin the criminal prosecution. See *American Federation of Labor* v. *Bain*, *supra*; *Sandys* v. *Williams*, 46 Ore. 327, 337, 80 Pac. 642; *Hall* v. *Dunn*, 52 Ore.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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MARCH 1960.

475, 481, 97 Pac. 811; *Portland Fish Co.* v. *Benson*, 56 Ore. 147, 155, 108 Pac. 122; *Sherod* v. *Aitchison*, 71 Ore. 446, 142 Pac. 351; *Spaulding* v. *McNary*, 64 Ore. 491, 497, 130 Pac. 391, 130 Pac. 1128; *Ideal Tea Co.* v. *Salem*, 77 Ore. 182, 185, 150 Pac. 852; *Nault* v. *Palmer*, 96 Ore. 538, 546; 190 Pac. 346; *Aluminum Cooking Utensil Co.* v. *City of North Bend, et al.*, 210 Ore. 442, 423, 311 P. 2d 464.

We have found no instance of the use of an equitable civil action to try collateral criminal issues such as are involved here. While the injunction here does not in terms enjoin the federal prosecution, this is its effect under the circumstances. Therefore, it would appear that the injunction would have been invalid even if issued by an Oregon court to bar testimony in another of Oregon's own courts, let alone in the courts of another, superior sovereign.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Petitioners,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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---

PETITIONERS' REPLY BRIEF

I. SINCE THE PRESENT CASE AT EVERY LEVEL PROCEEDED ON THE CONCESSION MADE BY THE UNITED STATES ATTORNEY AT THE HEARING ON THE MOTION TO SUPPRESS, "THAT FOR THE PURPOSES OF THIS MATTER WE MAY TREAT [THE STATE SEIZURE] AS ILLEGAL," THE PROSECUTION CANNOT NOW BE HEARD TO ARGUE THE CONTRARY

After Chief Herder had made it clear that he did not know the petitioner Clark (R. 72, 78), did not know where Clark lived (R. 75), had no personal knowledge of any obscene photographs or sound recordings at Clark's residence (R. 77) or of any other matters concerning Clark (R. 72, 73-74, 78), the trial judge asked the United States

Attorney for the prosecution's position as to the legality of the State seizure (R. 79). The United States Attorney said that he considered the matter immaterial (R. 79-80). Then followed this question and answer (R. 80):

> "The Court: Well, I was just wondering how far we should go into this matter of the State seizure.
>
> "Mr. Luckey: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that *for the purposes of this matter we may treat it as illegal.*"

In view of the last clause quoted—which we have italicized—it must be apparent that the prosecution's present assertion (U.S. Br. 30), that "the government, during petitioners' federal trial, neither claimed that the search and seizure was valid nor admitted its invalidity," is quite devoid of record support.

Similarly, the prosecution's further assertions (U.S. Br. 27) that the Federal district court "did not undertake to decide one way or another whether the state warrant was valid under state or federal law," and that (U.S. Br. 30) "the federal district court did not determine this issue," are palpably misleading: After the United States Attorney's concession there was nothing more as to this issue remaining to be litigated or determined.*

At no point in the trial which followed the denial of petitioners' motion to suppress did the United States Attorney ever withdraw his concession as to the illegality of the State seizure. At no point in his 59-page brief in the Court of Appeals did the United States Attorney either withdraw that concession or undertake to argue that the State seizure was legal.

Petitioners relied on the concession in seeking certiorari (Pet. 17, 22), and only argued the matter in terms of illegality as a matter of Federal law (Pet. 22). And the

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* During the trial, the Federal District Judge said (R. 313) that both State courts properly held the search illegal as a matter of Oregon law.

Government's memorandum in non-opposition to the petition for certiorari did not suggest in any way that the United States Attorney's concession of the illegality of the State seizure would be repudiated.

We submit, therefore, that it is not open to the prosecution at this juncture, after the record has been fixed, after the case has reached the third court, to withdraw the solemn concession made by its authorized representative at the trial. The doctrine of judicial admissions forbids. *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263-264; 9 Wigmore, *Evidence* (3rd ed. 1940) §§ 2588, 2590, 2591.

Of course, withdrawal of the concession made at the trial might avoid decision on the continued validity of the "silver platter" doctrine. But that issue was in the present case from the outset. The district court relied on the doctrine in denying the motion to suppress (R. 278-286), and the United States Attorney relied on it in his brief on appeal (Appellee's Br., No. 15378, C.A. 9, pp. 19-27), dismissing (*id.*, p. 21) petitioners' argument based on *Hanna* v. *United States*, 260 F. 2d 723 (D. C. Cir.) with the remark that "The *Hanna* case reaches its conclusion by speculating on possible future action of the Supreme Court."

There has therefore been no such change in circumstances as would justify the prosecution in now withdrawing its concession—except, no doubt, the circumstance that further speculation on the action of this Court may well have induced a newly-generated reluctance to allow the "silver platter" doctrine to be reexamined.

We submit that orderly judicial administration precludes success for the prosecution's present attempt to withdraw the United States Attorney's considered admission (R. 80) "that for the purposes of this matter we may treat it"—the State seizure—"as illegal."

II. IF HOWEVER THE LEGALITY OF THE STATE SEIZURE IS STILL OPEN, THEN THIS RECORD MAKES PERFECTLY CLEAR THAT IT WAS ILLEGAL BY FEDERAL STANDARDS.

A. State officers who break into a dwelling house under color of a search warrant based on multiple hearsay violate the Due Process clause of the Fourteenth Amendment.

(i) The State search warrant was based on multiple hearsay.

We set out below the facts as to the knowledge underlying the affidavit on which the State search warrant was issued, and do so in some detail, inasmuch as those facts are only selectively and partially, and hence quite misleadingly, stated in the prosecution's brief.

First. The affidavit underlying the State search warrant (R. 20-21) was executed "upon information and belief" (R. 20) by District Attorney Langley, who added (R. 21), "I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon." Accordingly, neither Langley (R. 55-56) nor the prosecution (U. S. Br. 6, 31) is now free to alter that document by contending that other but unnamed individuals also gave him the same information.

Second. Chief Herder testified that he did not know the petitioner Clark (R. 72, 78), that he did not know where Clark lived (R. 75), that he had no personal knowledge of any obscene photographs or sound recordings at Clark's residence (R. 77), and that he had no knowledge of any other matters concerning Clark (R. 72, 73-74, 78). This testimony was consistent with Chief Herder's earlier testimony at the hearing in the State District Court on the motion to suppress, when he had said that he did not know Clark (Def. Ex. 21, pp. 15, 16; not printed), that he did not know where Clark lived (*id.*, p. 16), and that while he had heard of Clark, he did not know him (*id.*, p. 17).

Moreover, as Chief Herder himself testified, all of his information was hearsay (R. 72, 73, 77, 78-79), and it was so stated by him to the newspaper reporter, Brad Williams (R. 73, 74, 79). The sources of some of Chief Herder's

information were Deputy Sheriffs Evans and Younce of Columbia County (R. 73, 74), who of course were not in any sense his subordinates, St. Helens being merely one municipality in that County.

Yet, in the face of this record, the prosecution undertakes to tell this Court (U. S. Br. 40) that "Police Chief Herder was in a particularly good position to know of petitioner Clark's activities"!

Third, Chief Herder was positive that he never talked to Langley (R. 72, 77; Def. Ex. 21, p. 15; not printed), whom he did know (R. 72). Chief Herder also located his telephone call to Williams, in which hearsay information as to alleged obscene recordings in Clark's possession was passed on, as having taken place during an evening (R. 72, 73, 75-76), probably on Friday, May 11, 1956 (R. 75). Chief Herder fixed the time of day with considerable circumstantial particularity (R. 72-75), and was positive that he did not talk to Williams around 3:30 P.M. on Thursday, May 17 (R. 78).

Langley, however, says that he listened in on the Herder-Williams conversation in his own office on Thursday afternoon, May 17 (R. 57-59), and his testimony regarding what Herder said (R. 55-56) was based on that listening-in, of which Chief Herder was unaware (R. 74).

We suggest that Langley never listened in on any conversation, and that he was simply told by Williams what Herder had said, no doubt without any qualification as to hearsay.

(1) Herder talked to Williams when the latter was at his newspaper office; Herder was sure of this because that was where he called Williams back (R. 75-76). A country Chief of Police would be more impressed by, and hence more likely to remember the time of, a long-distance telephone call, than the District Attorney in a large city. Herder therefore did not in fact make the call to Williams which Langley claims to have overheard.

(2) It strains credulity to suppose that a District Attorney in a city as large as Portland would fail to telephone the Chief of Police in a neighboring community directly if he wanted information, and would instead, unbeknownst to the source of his information, simply listen in on a reporter's call to such Police Chief. That is not the way prosecutors communicate with law enforcement officers.

(3) Herder was disinterested, with nothing at stake; Langley's official conduct was in issue. Indeed, shortly after testifying on the motion to suppress, Langley was indicted by the State Grand Jury (of Multnomah County) for conspiracy, some of the overt acts of which involved the very search warrant here in issue (Def. Ex. 46, not printed; see Overt Acts 2, 3, and 4).

(4) The prosecution complains that Langley was not permitted to testify when the motion to suppress was heard in the State District Court (U. S. Br. 9, 38 note 13). But the record of that hearing shows that despite the thrice repeated request of the State District Judge that Langley be present (Def. Ex. 21, pp. 8, 13, 21; not printed), the latter did not appear; instead, in the interval between the first and second sessions of that hearing (*id.*, pp. 21, 22, 26), Langley went before the State Grand Jury and had both petitioners indicted (*id.*, p. 26; R. 68) on the basis of the very evidence which was sought to be suppressed in the period proceeding. Langley can therefore hardly complain that he was denied a hearing at a proceeding that he so assiduously avoided attending.

In any event, since Langley deposed in his affidavit (R. 21) that "the source of my information is Chief of Police Herder of St. Helens, Oregon," and since Herder's testimony was (Def. Ex. 21, pp. 15-17; not printed) that he had no personal knowledge of Clark or his activities, there was nothing left to investigate. As Judge Mears said (R. 412), "You can't change this document." If Langley had there

testified as he later did in the present proceeding (R. 55-56), that he understood Chief Herder differently, he would not have enhanced either his affidavit or the warrant which it supported: When an informant lacks personal knowledge, the affiant's misunderstanding of the informant does not transform the latter's hearsay into actual knowledge.

Fourth. If, as we believe, Langley got his information from Williams, who in turn got his from Chief Herder, who in turn obtained his information from others, then the State search warrant (R. 404-405) was issued on an affidavit based on treble hearsay.

If, however, Langley's story of listening in on the extension phone is to be credited, then, regardless of what Langley may have thought he heard, or later said that he heard, it is still the fact that the sworn source of his information (R. 21), Chief Herder, had no personal knowledge of the matters set forth in the Langley affidavit (R. 20-21). This means that the State search warrant was based, not on triple, but only on double hearsay.

(ii) Multiple hearsay does not constitute probable cause sufficient to search a dwelling house

The prosecution argues (U. S. Br. 32) that "Langley's information was set forth in an affidavit and a state search warrant was obtained. Thus, far from constituting himself the sole judge of whether probable cause existed to make a search, Langley fully and fairly set forth the source and nature of his information and invoked proper state procedures in obtaining state process. The Langley affidavit would thus have been adequate to constitute probable cause for the issuance of a federal search warrant under the Fourth Amendment."

This argument conveniently ignores the fact that the very judge who issued the warrant stated that he would never have done so if Langley had revealed the true facts (R. 411-412, quoted at Pet. Br. 7).

Passing that point, we submit that where, as here, the affiant relies on information obtained from another who himself lacks personal knowledge, such double hearsay does not add up to probable cause, least of all where the search of a dwelling house is involved.

No case in this Court remotely sanctions reliance upon double hearsay even when less than the search of a dwelling house is involved.

In *Draper* v. *United States*, 358 U. S. 307, matter that was hearsay to the arresting officer, Marsh, was not hearsay to his informant.

In *Brinegar* v. *United States*, 338 U. S. 160, 172, "There was hearsay, but there was much more."

In *Carroll* v. *United States*, 267 U. S. 132, "the facts within the officers' knowledge when they intercepted the Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action." *Brinegar*, 338 U. S. at 177.

Draper involved arrest, *Brinegar* and *Carroll* the stopping of automobiles; none of those cases dealt with the search of a dwelling house. So far as the search of a dwelling house is concerned, this Court has squarely held that "a mere affirmation of suspicion and belief without any statement of adequate supporting facts" is insufficient, because in violation of the Fourth Amendment. *Nathanson* v. *United States*, 290 U. S. 41.

Since Langley had only information and belief, since his informant had no information that rose above hearsay, and since Langley's affidavit was similarly barren of "any statement of adequate supporting facts," we think it too plain for argument that he did not show probable cause for the issuance of a Federal search warrant under the Fourth Amendment, and that, by parity of reasoning, he failed to show probable cause for the issuance of a State

search warrant under the Fourteenth. The United States Attorney's trial concession as to the illegality of the original State seizure (R. 80) was therefore well founded.

Indeed, Langley did not establish probable cause sufficient even for the stopping of an automobile. See *Henry* v. *United States*, 361 U. S. 98, a case which the prosecution very pointedly omits to cite, although it was decided only a few months ago.

B. Since the State officers were acting under an invalid search warrant, they were not lawfully inside the petitioner Clark's house, and therefore had no authority to seize anything not contraband.

The prosecution argues (U. S. Br. 33) that "This Court has frequently held that an officer who has *lawfully* entered the premises, may seize both the 'instrumentality and means by which a crime is committed' and 'the fruits of crime.'" We have added the italics, because here the State officers who broke into the petitioner Clark's dwelling house were not lawfully on the premises: They entered pursuant to a warrant that was fatally defective because the affidavit on which that warrant was based did not establish probable cause. *Nathanson* v. *United States*, 290 U. S. 41. The prosecution's authorities are therefore inapplicable.

C. Even if it be assumed for purposes of argument that the State officers were lawfully within the house, they still lacked information entitling them to seize the tapes.

But even on the assumption—the very violent assumption—that the State officers were lawfully in Clark's residence, they were still not entitled to seize the tapes in question because the officers had no information that would lead them to believe that those tapes were (*Harris* v. *United States*, 331 U. S. 145, 154) "the instrumentalities and means by which a crime is committed."

Minielly, who found the tapes in the hassock after a reporter pointed to that piece of furniture (R. 249), admitted that he was unable to tell what the tapes contained (R. 247, 250) or whether they contained intercepted telephone conversations (R. 248), and admitted that there was no evidence to show that any of the many articles he seized (R. 407-408) were being used in the commission of any crime (R. 259-260).

The prosecution concedes (U. S. Br. 33) that Minielly was unable to determine the nature of the tapes' contents, because he did not know how to operate a tape recorder (R. 253). But it argues (U. S. Br. 7, 33) that, on the basis of the notes found in the boxes, Minielly was justified in concluding that the tapes were recordings of telephone communications, and therefore were property used to violate the law.

Now, very plainly, the laws against wire-tapping were violated only if (a) there was an interception *and* (b) such interception took place without the consent of the sender.

Visual inspection of the tapes would obviously reveal neither of these elements. But it is contended by the prosecution that Minielly obtained information as to the tapes' contents from (R. 248) "pieces of paper like note paper with a synopsis of what was contained on each tape, the names of individuals," and that these slips, plus what Minielly learned from newspaper reports (R. 248), led him to conclude that telephone conversations were recorded.

The difficulty with this theory is that it lacks record support. Minielly's testimony on the hearing of the motion to dismiss was given on April 12, 1957 (2 MS 396). Eleven months earlier, when testifying before the State District Court on the motion to suppress, Minielly said (Def. Ex. 21, p. 76; not printed) that

> "I just glanced at the notes. I didn't go to the trouble to read them."

Moreover, while Minielly arrested the petitioner Clark and Mrs. Martin for possessing slot machines, he did not arrest either of them for wire-tapping (*id.*, p. 85):

> "Q. You didn't arrest them for wire tapping then, did you?
> "A. No sir."

We might add that Minielly did not undertake to arrest Clark for possessing obscene and indecent photographs with accompanying sound recordings; Minielly's return on the search warrant (R. 406) shows that he found no matter of that description on the premises.

It is therefore not possible to sustain the prosecution's present belated claim that Minielly was aware of what the tapes contained when he seized them, much less that he then had the slightest intimation that these tapes might be instrumentalities or fruits of crime.*

The record accordingly shows that the raid on petitioner Clark's house was a general exploratory search for evidence of crime, precisely like those condemned in *Go-Bart Co.* v. *United States*, 282 U. S. 344, and in *United States* v. *Lefkowitz*, 285 U. S. 452. It was therefore an unreasonable search that violated the Due Process clause of the Fourteenth Amendment. *Wolf* v. *Colorado*, 338 U. S. 25.

III. IF THE LEGALITY OF THE STATE SEIZURE IS STILL OPEN, THEN THE PRESENT RECORD SIMILARLY MAKES PERFECTLY CLEAR THAT IT WAS ILLEGAL BY STATE STANDARDS ALSO.

As petitioners have several times indicated (Pet. Br. 45, 50, 70), the Federal District Court would have been entitled to reexamine the legality of the State seizure, a

* If petitioners had had any inkling that the prosecution would seek in this Court to repudiate the United States Attorney's concession regarding the illegality of the original seizure (R. 80), they would assuredly have designated for printing much more of the State District Court hearing, Def. Ex. 21, than they did (R. 410-414).

course which became unnecessary when the United States Attorney conceded that the State seizure was illegal (R. 80). Petitioners have never controverted the prosecution's argument (U. S. Br. 37) that the State Circuit Court's decision would not be binding on the Federal court in determining whether the evidence was illegally obtained.

What is primarily important here is that the State search and seizure was illegal under the Fourteenth Amendment. Its illegality under State law is only material because, by using the fruits of an illegal State seizure, the United States is relying on a violation of State law to redress a violation of Federal law. We have already demonstrated the impropriety of such use; see Pet. Br. 54-59, and especially Brandeis, J., in *Olmstead* v. *United States*, 277 U. S. 438, 479-485.

A. No Oregon decision holds that a search warrant for entry into a dwelling house may issue on multiple hearsay.

The prosecution now seeks to argue (U. S. Br. 38-40) that, in the case of *State* v. *Hoover*, 347 P. 2d 69, the Supreme Court of Oregon held (U. S. Br. 38) that "information received from an identified, reliable source constitutes sufficient probable cause under Oregon law for the issuance of a valid search warrant."

If anyone will trouble to read the cited opinion in the light of the facts there involved, he will readily find that *Hoover* held no such thing. That case did not concern a search warrant. The question there presented was whether, when a police officer had been informed that the driver of an automobile was carrying a gun, and was so informed by an individual at whom that driver had pointed the gun, the police officer was justified in arresting the driver and in searching his automobile. It will not come as a surprise that the search in those circumstances was held legal; after all, the police officer's informant was speaking from personal knowledge. Compare *Brinegar* v. *United States*, 338

U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; *Henry* v. *United States*, 361 U. S. 98.

Hoover involved a search of an automobile incident to an arrest. No dwelling house was even remotely involved. No search warrant was sought, in respect of which the Oregon Constitution's requirement in its Article I, Section 9 (Pet. Br. 105) is identical with that of the Fourth Amendment. And the officer's informant in *Hoover*, unlike the informant on whom Langley relied here (R. 21), had personal knowledge of the facts.

It cannot therefore be supposed that the Supreme Court of Oregon was undertaking to overrule *sub silentio* its repeated holdings that an affidavit on information and belief did not supply the probable cause which the Oregon Constitution prescribes as the prerequisite for the issuance of a search warrant. *State* v. *Quartier*, 114 Ore. 657, 236 Pac. 746, and other cases cited at Pet. Br. 38. Indeed, we submit that Oregon could not constitutionally sanction police entries into private residences merely on the basis of hearsay. *Wolf* v. *Colorado*, 338 U. S. at 28, quoted at Pet. Br. 43.

Any contention to the contrary is the most wishful kind of wishful thinking—although of course it does underscore the lengths to which the prosecution feels impelled to go to avoid reexamination of the "silver platter" doctrine.

It should also be noted that, under Oregon law, the right of an officer to seize articles not named in the warrant is limited to "property that he discovers by his own senses is being then and there used as an instrumentality in the commission of a crime." *State* v. *Muetzel*, 121 Ore. 561, 565, 254 Pac. 1010, 1011—a case inaccurately, because far too broadly, stated at U. S. Br. 40. Minielly's testimony plainly showed that the tapes he seized were not being "then and there used as an instrumentality in the commission of a crime" (R. 247-250).

B. In any event, no subsequent decision can affect the fact that two Oregon courts suppressed the evidence now in question in proceedings terminated more than three years earlier.

But, even if *State* v. *Hoover*, 347 P. 2d 69, decided in November 1959, is susceptible of a broader interpretation, it cannot alter the fact that, in May and again in September 1956, two Oregon courts suppressed the evidence here in question because of the illegality of the State search and seizure (R. 21-24, 411-413; 25-28). Moreover, the record shows that "the said Attorney General [of Oregon] has advised the District Attorney of Multnomah County in writing that the said evidence was illegally seized by State officers." The foregoing quotation is from a document filed in the State Circuit Court on September 25, 1956, after the latter's order suppressing the evidence, and signed by Howard Lonergan on behalf of his superior, District Attorney Langley. Def. Ex. 13; not printed.

So far as the present proceeding is concerned, therefore, the illegality of the State seizure must be taken as established, nor would that illegality be affected by a subsequent change in the law, even if it could be assumed that such a change had ever actually occurred. For when rights and liabilities have once become settled by judgments no longer subject to appeal, later modifications in the law, whether by judicial decision or otherwise, do not unsettle what has already been finally adjudicated.

Thus, a decisional change, through overruling or qualification, does not result in release for prisoners whose convictions had become final while the earlier decisions were still deemed binding. *Sunal* v. *Large*, 332 U. S. 174; *Warring* v. *Colpoys*, 122 F. 2d 642 (App. D. C.), certiorari denied, 314 U. S. 678. Similarly, the repeal of the Eighteenth Amendment did not entitle violators of the National Prohibition Act whose convictions had become final to leave their prisons. *Hosier* v. *Aderhold*, 71 F. 2d 422 (C. A. 5); *United States ex rel. Nerbonne* v. *Hill*, 70 F. 2d 1006 (C. A. 3); cf. *United States* v. *Chambers*, 291 U. S. 217 (*aliter* where judgment not final).

Nor is it correct to urge (U. S. Br. 37) that the orders of suppression were not reviewable. The record shows that the State District Court's order of suppression (R. 21-24) was reargued in the State Circuit Court (R. 25-28). And *State* v. *DeFord*, 120 Ore. 444, 250 Pac. 220, represents an instance of the prosecution being able to review an order suppressing evidence. See also O.R.S. 34.010 (writ of review).

Here the State Circuit Court's order of suppression (R. 25-28) was not appealed, not because it was unreviewable, but because the District Attorney preferred to let the Federal prosecution proceed since, as noted, he had been advised by the State Attorney General that the State seizure was illegal. Def. Ex. 13, not printed, quoted in part at Pet. Br. 11, note 3.

C. Langley's tardy motion to reopen the State Restraining Order is without legal significance.

The extent to which the prosecution is prepared to go to avoid arguing the "silver platter" doctrine on the merits is further emphasized by its reliance (U. S. Br. 29) on a belated motion, filed by Langley on February 29, 1960, seeking to vacate the State Circuit Court's orders of April and May 1957 which restrained the State and County witnesses from testifying (R. 301-304). We set forth in an Appendix the text of this motion, which will be heard on March 31, 1960.*

Langley's desperation is understandable. He has been removed as District Attorney for misconduct in office. *State* v. *Langley*, 214 Ore. 445, 315 P. 2d 560, 323 P. 2d 301, certiorari denied, 358 U. S. 826 (No. 193, Oct. T. 1958). He is moreover the subject of pending disbarment proceedings. See *In re Langley's Conduct*, 341 P. 2d 538. While his motion seems plainly devoid of merit, it would

* Judge Redding said in open court on March 23 that in his opinion nothing in the *Hoover* case (in which he sat as a member of the Supreme Court) minimized the illegality of the State seizure in the present case.

be unfair in the circumstances to criticize him for grasping at straws.

But why does the prosecution here feel it necessary to rely on such a weak reed for the proposition (U. S. Br. 29) that *State* v. *Hoover*, 347 P. 2d 69, which dealt with the search of an automobile incident to an arrest, on information known to the informant, may somehow, sometime, lead to a holding that, contrary to the plain intent and language of the Oregon Constitution, a warrant to search a dwelling house may issue on an affidavit which rests on multiple hearsay?

IV. THE FEDERAL SEARCH WARRANT CANNOT BE SUSTAINED ON APPEAL ON A FACTUAL BASIS THAT THE TRIER OF FACTS REFUSED TO CONSIDER.

Petitioners' position as to the Federal search warrant (Pet. Br. 91-103) is briefly that, while there is enough in the record to show its invalidity, the Court of Appeals was not free to hold that document valid after the District Court had cut off proof. Otherwise stated, an appellate court may not sustain a conviction on appeal on a factual ground not passed on by the trier of facts. *Grunewald* v. *United States*, 353 U. S. 391.

At R. 201, the District Judge said that in his view it made no difference whether the Federal search warrant was valid or not; and when counsel asked what that ruling "would prevent me from attempting," the judge replied (R. 201),

> "Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.
>
> . . . . . .
>
> "From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk."

The prosecution now argues that because the judge immediately afterwards told counsel (R. 201) that "You may make your record," "To protect your theory about it", this meant (U. S. Br. 43) "that defense counsel was entitled to inquire fully as to the sources of Sherk's knowledge."

It must be obvious that this argument was not formulated by anyone who had ever tried a case in a United States District Court. When a United States District Judge tells counsel he may not inquire further but may make his record to protect his theory, that is certainly not an invitation to persist in repeating the excluded questions. Indeed, the colloquy on R. 202, immediately following, shows that the ruling was not understood by any of the participants in the trial in the sense that the prosecution now formulates.

We note that, in its discussion of the Federal search warrant (U. S. Br. 41-45), the prosecution does not reply to our contention (Pet. Br. 101-103) that this instrument was invalid because directed at property in the constructive custody of a State court.

Silence at times may well have virtue, but in this instance it fails to indicate whether the prosecution agree with us, or whether they simply consider our proposition too thorny to be firmly grasped.

V. EVIDENCE OBTAINED IN VIOLATION OF THE FOURTEENTH AMENDMENT IS INADMISSIBLE IN A FEDERAL PROSECUTION REGARDLESS OF THE DEGREE OR ENORMITY OF THE VIOLATION.

The prosecution argues (U. S. Br. 67-71) that, "If the 'silver platter' doctrine is rejected, this Court could consider the seriousness of the impropriety in deciding whether to exclude evidence illegally obtained."

That suggestion, all too plainly, boils down to a contention that, so long as there is present only a little unconstitutionality, a conviction based on illegally seized evidence should none the less be sustained.

We have no doubt that the Court will reject this all too obviously last-ditch alternative. A search is either valid or invalid; there is no middle ground. Close cases will of course arise in the future, as indeed they have in the past; but however difficult it may be to draw the line, a line must somewhere be drawn. An illegal search can no more be saved from condemnation by the apologetic comment that it is only slightly unconstitutional than an egg can be classed as edible simply because it is only slightly rotten.

The prosecution argues (U. S. Br. 68) that "evidence should not be barred which was obtained by state officers acting in good faith but mistakenly failing to comply with all the legal requirements. Only that evidence would be barred which was obtained by intentional or clear violation of constitutional rights."

Even under that attenuated standard, it is plain that the present search cannot be saved. For this record shows all too plainly that the State officers did not act in good faith.

1. Langley was out to get the petitioner Elkins, and had it in mind to send him to the penitentiary for life on the strength of a traffic charge. See Langley's testimony (9 Tr. 1517, 10 Tr. 1671) quoted at Pet. Br. 49, note 2.

2. Langley was less than candid with the State District Judge to whom he applied for a search warrant (R. 411-412, quoted at Pet. Br. 7).

3. Langley caused the search warrant to be executed and served between 8:30 and 11:30 P. M. of a night (R. 406, 408) that was followed by three non-judicial days (Pet. Br. 7). Otherwise stated, no judicial redress for the illegal Thursday night search could be had until Monday morning.

4. The State officers copied the tapes during that interval and facilitated publication of their contents in a newspaper (Pet. Br. 6, 8).

5. Langley used the tapes to obtain petitioners' indictment by the State Grand Jury at the very time that a motion to suppress those very tapes was *sub judice* in the State District Court (Pet. Br. 8; R. 26, 68; Def. Ex. 21, pp. 21, 22, 26, not printed).

It is therefore sheer mockery for the prosecution to speak (U. S. Br. 68) of "state officers acting in good faith but mistakenly failing to comply with all the legal requirements."

Petitioners are not alone in questioning the motives of the State officers concerned. Langley was indicted for the excesses growing out of the defective warrant (Def. Ex. 46, not printed); he has since been judicially removed from office because of misconduct (*State* v. *Langley*, 214 Ore. 445, 315 P. 2d 560, 323 P. 2d 391, certiorari denied, 358 U. S. 826); and he is the subject of pending disbarment proceedings (*supra*, p. 15). It is true that after his removal from office the pending indictment was dismissed at the instance of the prosecution, but certainly that *nolle prosequi* did not amount to an affirmation of Langley's good faith in May 1956.

Nor is it possible to urge that the evidence here in question was not (U. S. Br. 68) "obtained by intentional or clear violation of constitutional rights."

Forcible breaking into a dwelling house in the night-time (R. 240, 406) can hardly be classed as an inadvertent or as a merely negligent act. And if there can be a clearer violation of constitutional rights than the issuance of a search warrant for entry into a private residence on an affidavit which is based on treble or—at the most charitable—double hearsay, it has not yet been disclosed.

The remaining issues under the "silver platter" doctrine do not require further argument.*

VI. THE SUPREMACY CLAUSE CANNOT PROPERLY BE INVOKED TO FURTHER A VIOLATION OF THE FOURTEENTH AMENDMENT.

Petitioners argued (Pet. Br. 74-91) that the rule of *Rea v. United States*, 350 U. S. 214, was one of comity, justifying the State Circuit Court in enjoining State officials from testifying as to the circumstances of a State search and seizure that two State courts had successively held illegal. The prosecution, arguing to the contrary (U. S. Br. 71-84), invokes the Supremacy Clause.

There is no need to repeat or restate petitioners' views on that issue here; they have already been fully presented. It is sufficient to add that, if the *Rea* question is reached, and if it is decided on the basis of the prosecution's arguments, then the Supremacy Clause will have been employed, not to establish the national paramountcy of "This Constitution," but rather to insure that courts of the United States shall accord to violations of the Fourteenth Amendment an approbation that does not inure to violations of the Fourth.

Otherwise stated, the prosecution is now in the position of invoking the Supremacy Clause in an effort to redress the violation of a Federal statute with the fruits of a demonstrable violation of the Federal Constitution.

* It is not however accurate for the prosecution (U. S. Br. 60) to characterize petitioners' contentions based on the possibility of subterfuge and evasion (Pet. Br. 72-74) as their "principal arguments" in favor of excluding the present evidence. Our principal argument under "silver platter" is the one we placed first, and advisedly placed first, viz., that "The assumption underlying the 'silver platter' doctrine has since been rejected by this Court" (Pet. Br. 52-54).

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that the judgments below should be reversed, and the case remanded to the United States District Court for the District of Oregon, with directions to grant petitioners' motion to suppress.

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MARCH 1960.

[See overleaf for Appendix.]

APPENDIX

Langley's 1960 Motion to Vacate 1957 Orders

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
Plaintiffs,

vs.

GEORGE MINTELLY, TERRY SCHRUNK, WILLIAM M. LANGLEY, *et al.*,
Defendants.

MOTION

Comes now William M. Langley and moves this Court to vacate the Orders of the within Court dated April 15, 1957 and May 21, 1957, and in support of this motion states:

That the Sheriff of Multnomah County, Oregon, conducted on May 17, 1957, a search of the home of Raymond Frederick Clark pursuant to a search warrant issued by a magistrate of Multnomah County, Oregon. A copy of the affidavit for the search warrant is attached hereto marked exhibit A.

That the said Orders were based upon a decision, to-wit: "that the search warrant was improperly obtained on a faulty affidavit in that the Honorable William M. Langley, District Attorney for Multnomah County, who applied therefor, did not have personal knowledge of the facts set forth in his affidavit", by the within Court.

That after the above decision by the within Court, the Oregon Supreme Court, the highest Court in Oregon, on November 25, 1959, in *State of Oregon* vs. *Hoover*, held that there is no constitutional barrier to a search based upon information alone; and that probable cause exists when the information is from a reasonably trustworthy source.

That the information contained in exhibit A was from a reasonably trustworthy source, to-wit: Chief of Police Herder of St. Helens, Oregon.

POINTS AND AUTHORITIES

The question is one of probable cause.

Probable cause is established by information from a trustworthy source. *State* vs. *Hoover*, 347 P. 2d. 69; decided by Oregon Supreme Court, November 25, 1959. *Pucaro* vs. *McKonnell*, 198 NYS (New York Supp.) 719—cited with approval in *State* vs. *Hoover*.

/s/ WILLIAM M. LANGLEY.

[Certificate of Service omitted]

SUPREME COURT OF THE UNITED STATES

No. 126.—October Term, 1959.

James Butler Elkins and Raymond Frederick Clark, Petitioners,
v.
United States of America.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 27, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were indicted in the United States District Court in Oregon for the offense of intercepting and divulging telephone communications and of conspiracy to do so. 47 U. S. C. §§ 501, 605; 18 U. S. C. § 371. Before trial the petitioners made a motion to suppress as evidence several tape and wire recordings and a recording machine, which had originally been seized by state law enforcement officers in the home of petitioner Clark under circumstances which, two Oregon courts had found, had rendered the search and seizure unlawful.[1]

[1] The state officers, having received information that petitioners had in their possession obscene motion pictures, procured a search warrant to search petitioner Clark's home. The affidavit upon which the warrant was based recited that "upon information and belief" it was thought that Clark possessed obscene pictures and accompanying sound recordings. The search revealed no obscene pictures, but various paraphernalia believed to have been used in making wiretaps were found and seized.

Following an appropriate motion, the Multnomah County District Court held the search warrant invalid and ordered suppression of the evidence. This action came, however, after the return of an indictment by a state grand jury, and the local district attorney challenged the power of the district court to suppress evidence once an indictment was in. Accordingly, the question was later argued anew on a motion to suppress in the Circuit Court for Multnomah

At the hearing on the motion the district judge assumed without deciding that the articles had been obtained as the result of an unreasonable search and seizure, but denied the motion to suppress because there was no evidence that any "agent of the United States had any knowledge or information or suspicion of any kind that this search was being contemplated or was eventually made by the State officers until they read about it in the newspaper." At the trial the articles in question were admitted in evidence against the petitioners, and they were convicted.

The convictions were affirmed by the Court of Appeals for the Ninth Circuit, 266 F. 2d 588. That court agreed with the district judge that it was unnecessary to determine whether or not the original state search and seizure had been lawful, because there had been no participation by federal officers. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized." 266 F. 2d, at 594.

We granted certiorari, 361 U. S. 810, to consider a question of importance in the administration of federal justice. The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, be introduced in evidence against a defendant over his timely objection in a federal criminal trial? In a word, we

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County, a court of general criminal jurisdiction. That court held the search unlawful and granted the motion to suppress. The state indictment was subsequently dismissed.

During the course of these state proceedings federal officers, acting under a federal search warrant, obtained the articles from the safe deposit box of a local bank where the state officials had placed them. Shortly after the state case was abandoned, a federal indictment was returned, and the instant prosecution followed.

re-examine here the validity of what has come to be called the silver platter doctrine.[2] For the reasons that follow we conclude that this doctrine can no longer be accepted.

To put the issue in historic perspective, the appropriate starting point must be *Weeks* v. *United States*, 232 U. S. 383, decided in 1914. It was there that the Court established the rule which excludes in a federal criminal prosecution evidence obtained by federal agents in violation of the defendant's Fourth Amendment rights. The foundation for that decision was set out in forthright words:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

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[2] The "silver platter" label stems from a phrase first turned in the prevailing opinion in *Lustig* v. *United States*, 338 U. S. 74, 79. The doctrine has been the subject of much comment in legal periodicals. See, *e. g.*, Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 14–25; Galler, The Exclusion of Illegal State Evidence in Federal Courts, 49 J. Crim. L. C. & P. S. 455; Kohn, Admissibility in Federal Court of Evidence Illegally Seized by State Officers, 3 Wash. U. L. Q. 229; Kamisar, *Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083; Parsons, State-Federal Crossfire in Search and Seizure and Self Incrimination, 42 Cornell L. Q. 346, 347–368; Comment, The *Benanti* Case: State Wiretap Evidence and the Federal Exclusionary Rule, 57 Col. L. Rev. 1159; Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144; Notes, 51 Col. L. Rev. 128, 27 Geo. Wash. L. Rev. 392, 5 N. Y. L. F. 301, 6 U. C. L. A. Rev. 703.

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
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> ". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U. S. 383, 391–393.

To the exclusionary rule of *Weeks* v. *United States* there has been unquestioning adherence for now almost half a century. See *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20; *Go-Bart Co.* v. *United States*, 282 U. S. 344; *Grau* v. *United States*, 287 U. S. 124; *McDonald* v. *United States*, 335 U. S. 451; *United States* v. *Jeffers*, 342 U. S. 48.

But the *Weeks* case also announced, unobtrusively but nonetheless definitely, another evidentiary rule. Some of the articles used as evidence against Weeks had been unlawfully seized by local police officers acting on their own account. The Court held that the admission of this evidence was not error for the reason that "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." 232 U. S., at 398. Despite the limited discussion of this second ruling in the *Weeks* opinion, the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years. See, *e. g.*, *Byars* v. *United States*, 273 U. S. 28, 33; *Feldman* v. *United States*, 322 U. S. 487, 492.[3]

That such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction could not, perhaps, have been foreseen. In any event the difficulties soon appeared. They arose from the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity. When in a federal criminal prosecution evidence which had been illegally seized by state officers was sought to be introduced, the question inevitably arose whether there had been such participation by federal

[3] See, *e. g.*, *Rettich* v. *United States*, 84 F. 2d 118 (C. A. 1st Cir.); *Milburne* v. *United States*, 77 F. 2d 310 (C. A. 2d Cir.); *Miller* v. *United States*, 50 F. 2d 505 (C. A. 3d Cir.); *Riggs* v. *United States*, 299 Fed. 273 (C. A. 4th Cir.); *Timonen* v. *United States*, 286 Fed. 935 (C. A. 6th Cir.); *Fowler* v. *United States*, 62 F. 2d 656 (C. A. 7th Cir.) (dictum); *Elam* v. *United States*, 7 F. 2d 887 (C. A. 8th Cir.); *Brown* v. *United States*, 12 F. 2d 926 (C. A. 9th Cir.); *Gilbert* v. *United States*, 163 F. 2d 325 (C. A. 10th Cir.); *Shelton* v. *United States*, 169 F. 2d 665 (C. A. D. C. Cir.), overruled by *Hanna* v. *United States*, 260 F. 2d 723.

agents in the search and seizure as to make applicable the exclusionary rule of *Weeks*. See *Flagg* v. *United States*, 233 Fed. 481, 483; *United States* v. *Slusser*, 270 Fed. 818, 820; *United States* v. *Falloco*, 277 Fed. 75, 82; *Legman* v. *United States*, 295 Fed. 474, 476–478; *Marron* v. *United States*, 8 F. 2d 251, 259; *United States* v. *Brown*, 8 F. 2d 630, 631.

This Court first came to grips with the problem in *Byars* v. *United States*, 273 U. S. 28. There it was held that when the participation of the federal agent in the search was "under color of his federal office" and the search "in substance and effect was a joint operation of the local and federal officers," then the evidence must be excluded, because "the effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own." 273 U. S., at 33. In *Gambino* v. *United States*, 275 U. S. 310, the Court went further. There state officers had seized liquor from the defendants' automobile after an unlawful search in which no federal officers had participated. The liquor was admitted in evidence against the defendants in their subsequent federal trial for violation of the National Prohibition Act. This Court reversed the judgments of conviction, holding that the illegally seized evidence should have been excluded. Pointing out that there was "no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the [state] troopers believed that they had," the Court found that "the wrongful arrest, search and seizure were made solely on behalf of the United States." 275 U. S., at 314, 316.

Despite these decisions, or perhaps because of them, cases kept arising in which the federal courts were faced with determining whether there had been such participation by federal officers in a lawless state search as to make inadmissible in evidence that which had been seized.

And it is fair to say that in their approach to this recurring question, no less than in their disposition of concrete cases, the federal courts did not find themselves in complete harmony, nor even internally self-consistent.[4] No less difficulty was experienced by the courts in determining whether, even in the absence of actual participation by federal agents, the state officers' illegal search and seizure had nevertheless been made "solely on behalf of the United States."[5]

But difficult and unpredictable as may have been their application to concrete cases, the controlling principles seemed clear up to 1949. Evidence which had been seized by federal officers in violation of the Fourth Amendment could not be used in a federal criminal prosecution. Evidence which had been obtained by state agents in an unreasonable search and seizure was admissible, because, as *Weeks* had pointed out, the Fourth Amendment was not "directed to" the "misconduct of such officials." But if federal agents had participated in an unreasonable search and seizure by state officers, or if the state officers had acted solely on behalf of the United States, the evidence was not admissible in a federal prosecution.

Then came *Wolf* v. *Colorado*, 338 U. S. 25. With the ultimate determination in *Wolf*—that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents—we

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[4] Compare *Sutherland* v. *United States*, 92 F. 2d 305 (C. A. 4th Cir.); *Ward* v. *United States*, 96 F. 2d 189 (C. A. 5th Cir.); *Fowler* v. *United States*, 62 F. 2d 656 (C. A. 7th Cir.); *United States* v. *Butler*, 156 F. 2d 897 (C. A. 10th Cir.); with *Kitt* v. *United States*, 132 F. 2d 920 (C. A. 4th Cir.); *Sloane* v. *United States*, 47 F. 2d 889 (C. A. 10th Cir.).

[5] Compare *United States* v. *Jankowski*, 28 F. 2d 800 (C. A. 2d Cir.); *Marsh* v. *United States*, 29 F. 2d 172 (C. A. 2d Cir.); with *United States* v. *Butler*, 156 F. 2d 897 (C. A. 10th Cir.).

are not here directly concerned. But nothing could be of greater relevance to the present inquiry than the underlying constitutional doctrine which *Wolf* established. For there it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. "The security of one's privacy against arbitrary intrusion by the police . . . is implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. 25, 27. The Court has subsequently found frequent occasion to reiterate this statement from *Wolf*. See *Stefanelli* v. *Minard*, 342 U. S. 117, 119; *Irvine* v. *California*, 347 U. S. 128, 132; *Frank* v. *Maryland*, 359 U. S. 360, 362–363.

The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949. This removal of the doctrinal underpinning for the admissibility rule has apparently escaped the attention of most of the federal courts, which have continued to approve the admission of evidence illegally seized by state officers without so much as even discussing the impact of *Wolf*.[6] Only two of the courts of appeals which have adhered to the admissibility rule appear to have recognized that *Wolf* casts doubt upon its continuing validity. *Jones* v. *United States*, 217 F. 2d 381 (C. A. 8th Cir.); *United States* v. *Benanti*, 244 F. 2d 389 (C. A. 2d Cir.), reversed on other grounds, 355 U. S. 96. Cf. *Kendall* v. *United States*, 272 F. 2d 163,

[6] See, e. g., *Burford* v. *United States*, 214 F. 2d 124, 125 (C. A. 5th Cir.); *Ford* v. *United States*, 234 F. 2d 835, 837 (C. A. 6th Cir.); *United States* v. *Moses*, 234 F. 2d 124 (C. A. 7th Cir.); *Williams* v. *United States*, 215 F. 2d 695, 696 (C. A. 9th Cir.); *Gallegos* v. *United States*, 237 F. 2d 694, 696–697 (C. A. 10th Cir.).

165 (C. A. 5th Cir.). The Court of Appeals for the District of Columbia has been alone in squarely holding "that the *Weeks* and *Wolf* decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts." *Hanna* v. *United States*, 260 F. 2d 723, 727.

Yet this Court's awareness that the constitutional doctrine of *Wolf* operated to undermine the logical foundation of the *Weeks* admissibility rule has been manifest from the very day that *Wolf* was decided. In *Lustig* v. *United States*, 338 U. S. 74, decided that day, the prevailing opinion carefully left open the question of the continuing validity of the admissibility rule. "Where there is participation on the part of federal officers," the opinion said, "it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." 338 U. S., at 79. And in *Benanti* v. *United States*, 355 U. S. 96, the Court was at pains to point out that "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court. . . ." 355 U. S., at 102, note 10. There the question has stood for 11 years.

If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.[7] It would be a curiously ambivalent rule

[7] Long before the Court established that the Fourteenth Amendment protects the security of one's privacy against arbitrary intrusion by state officers, Mr. Justice (then Judge) Cardozo perceived a basic incongruity in a rule which excludes evidence unlawfully obtained

that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution. Moreover, it would seem logically impossible to justify a policy that would bar from a federal trial what state officers had obtained in violation of a federal statute, yet would admit that which they had seized in violation of the Constitution itself. Cf. *Benanti* v. *United States*, 355 U. S. 96.

Mere logical symmetry and abstract reasoning are perhaps not enough, however, to support a doctrine that would exclude relevant evidence from the trial of a federal criminal case. It is true that there is not involved here an absolute or qualified testimonial privilege such as that accorded a spouse, a patient, or a penitent, which irrevocably bars otherwise admissible evidence because of the *status* of the witness or his relationship to the defendant. Cf. *Hawkins* v. *United States*, 358 U. S. 74. A rule which would exclude evidence if, and only if, government officials in a particular case had chosen to engage in unlawful *conduct* is of a different order. Yet, any apparent

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by federal officers, but admits in the same court evidence unlawfully obtained by state agents. "The Federal rule as it stands is either too strict or too lax. A Federal prosecutor may take no benefit from evidence collected through the trespass of a Federal officer. . . . He does not have to be so scrupulous about evidence brought to him by others. How finely the line is drawn is seen when we recall that marshals in the service of the nation are on one side of it and police in the service of the States on the other. The nation may keep what the servants of the States supply. . . . We must go farther or not so far. The professed object of the trespass rather than the official character of the trespasser should test the rights of government. . . . A government would be disingenuous, if in determining the use that should be made of evidence drawn from such a source, it drew a line between them. This would be true whether they had acted in concert or apart." *People* v. *Defore*, 242 N. Y. 13, 22–23.

limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice.

What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States*, 318 U. S. 332, 341. In devising such evidentiary rules, we are to be governed by "principles of the common law as they may be interpreted . . . in the light of reason and experience." Rule 26, Fed. Rules Crim. Proc. Determination of the issue before us must ultimately depend, therefore, upon evaluation of the exclusionary rule itself in the context here presented.

The exclusionary rule has for decades been the subject of ardent controversy. The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here. Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence—"The criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21. The same point was made at somewhat greater length in the often quoted words of Professor Wigmore: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the

man who breaks it, but to let off somebody else who broke something else." 8 Wigmore, Evidence (3d ed. 1940), § 2184.

Yet, however felicitous their phrasing, these objections hardly answer the basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. See *Eleuteri* v. *Richman*, 26 N. J. 506, 513. Mr. Justice Jackson summed it up well:

> "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
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> "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Brinegar* v. *United States*, 338 U. S. 160, 181 (dissenting opinion).

Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a

negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

But pragmatic evidence of a sort is not wanting. The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.[8] Moreover, the expe-

[8] The Director of the Federal Bureau of Investigation has written as follows:

"One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

"Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every duly constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods.

"Complete protection of civil rights should be a primary concern of every officer. These rights are basic in the law and our obligation to uphold it leaves no room for any other course of action. Although the great majority in our profession have long since adopted that policy we cannot yet be entirely proud of our record. Incidents which give justification to charges of civil rights violations by law enforcement officers still occur. . . . This state of affairs ought to be taken as a challenge to all of us. Every progressive police admin-

rience of the states is impressive. Not more than half the states continue totally to adhere to the rule that evidence is freely admissible no matter how it was obtained.[9] Most of the others have adopted the exclusionary rule in its entirety; the rest have adopted it in part.[10] The movement towards the rule of exclusion has been halting but seemingly inexorable.[11] Since the *Wolf* decision one state has switched its position in that direction by legislation,[12] and two others by judicial decision.[13] Another state, uncommitted until 1955, in that year adopted the rule of exclusion.[14] Significantly, most of the exclusionary states which have had to consider the issue have held that evidence obtained by *federal* officers in a search and seizure unlawful under the Fourth Amendment must be suppressed in a prosecution in the *state* courts. *State* v. *Arregui*, 44 Idaho 43, 254 P. 788; *Walters* v. *Commonwealth*, 199 Ky. 182, 250 S. W. 839; *Little* v. *State*, 171 Miss. 818, 159 So. 103; *State* v. *Rebasti*, 306 Mo. 336, 267 S. W. 858; *State* v. *Hiteshew*, 42 Wyo. 147, 292 P. 2; see *Ramirez* v. *State*, 123 Tex. Crim. 254, 58 S. W. 2d 829. Compare *Rea* v. *United States*, 350 U. S. 214.

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istrator and officer must do everything in his power to bring about such an improvement that our conduct and our record will conclusively prove each of these charges to be false." FBI Law Enforcement Bulletin, September, 1952, pp. 1–2.

[9] See Appendix.

[10] See Appendix.

[11] For a discussion of recent developments in British Commonwealth jurisdictions, see Cowen, The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions, 5 Vanderbilt L. Rev. 523 (1952). The author concludes upon a survey of Commonwealth decisions "that there is no uniform rule on the admissibility of evidence procured through illegal searches and seizures." *Id.*, at 546.

[12] North Carolina. See Appendix.

[13] Delaware and California. See Appendix.

[14] Rhode Island. See Appendix.

The experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court." 44 Cal. 2d 434, at 445, 447, 282 P. 2d 905, at 911, 912, 913.

The chief law enforcement officer of California was quoted as having made this practical evaluation of the *Cahan* decision less than two years later:

> "The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice." [15]

[15] Excerpt from letter of Governor Edmund G. Brown, then Attorney General of the State of California, to the Stanford Law Review, quoted in Note, 9 Stan. L. Rev. 515, 538 (1957). See also Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on *People* v. *Cahan*, 43 Cal. L. Rev. 565, 586–588 (1955).

Impressive as is this experience of individual states, even more is to be said for adoption of the exclusionary rule in the particular context here presented—a context which brings into focus considerations of federalism. The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way. Cf. *Wolf* v. *Colorado*, 338 U. S. 25.

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. Without pausing to analyze individual decisions, it can fairly be said that in

applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement. Indeed, there are those who think that some of the Court's decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee. See *Harris* v. *United States*, 331 U. S. 145, 155, 183, 195 (dissenting opinions); *United States* v. *Rabinowitz*, 339 U. S. 56, 66, 68 (dissenting opinions). In any event, while individual cases have sometimes evoked "fluctuating differences of view, . . ." *Abel* v. *United States*, 362 U. S. 217, 235, it can hardly be said that in the over-all pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary.

These, then, are the considerations of reason and experience which point to the rejection of a doctrine that would freely admit in a federal criminal trial evidence seized by state agents in violation of the defendant's constitutional rights. But there is another consideration—the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in *Olmstead* v. *United States*, 277 U. S. 438, at 469, 471, more than 30 years ago. "For those who agree with me," said Mr. Justice Holmes, "no distinction can be taken between the Government as prosecutor and the Government as judge." 277 U. S., at 470. (Dissenting opinion.) "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that

the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." 277 U. S., at 485. (Dissenting opinion.)

This basic principle was accepted by the Court in *McNabb* v. *United States*, 318 U. S. 332. There it was held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." 318 U. S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.

For these reasons we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.[18] In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

The judgment of the Court of Appeals is set aside, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

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[18] See Rule 41 (e), Fed. Rules Crim. Proc. The defendant, of course, must have "standing" to object. See *Jones* v. *United States*, 362 U. S. 257.

APPENDIX.

TABLE I.—*Admissibility, in state courts, of evidence illegally seized by state officers.*

State	*Pre-Weeks*	*Pre-Wolf*	*Post-Wolf*
Alabama	Admissible	Admissible	Partially excludable
Arizona	----------	Admissible	Admissible
Arkansas	Admissible	Admissible	Admissible
California	Admissible	Admissible	Excludable
Colorado	----------	Admissible	Admissible
Connecticut	Admissible	Admissible	Admissible
Delaware	----------	Admissible	Excludable
Florida	----------	Excludable	Excludable
Georgia	Admissible	Admissible	Admissible
Idaho	Admissible	Excludable	Excludable
Illinois	Admissible	Excludable	Excludable
Indiana	----------	Excludable	Excludable
Iowa	Excludable	Admissible	Admissible
Kansas	Admissible	Admissible	Admissible
Kentucky	----------	Excludable	Excludable
Louisiana	----------	Admissible	Admissible
Maine	Admissible	Admissible	Admissible
Maryland	Admissible	Partially excludable	Partially excludable
Massachusetts	Admissible	Admissible	Admissible
Michigan	Admissible	Excludable	Partially excludable
Minnesota	Admissible	Admissible	Admissible
Mississippi	----------	Excludable	Excludable
Missouri	Admissible	Excludable	Excludable
Montana	Admissible	Excludable	Excludable
Nebraska	Admissible	Admissible	Admissible
Nevada	----------	Admissible	Admissible
New Hampshire	Admissible	Admissible	Admissible
New Jersey	----------	Admissible	Admissible
New Mexico	----------	Admissible	Admissible
New York	Admissible	Admissible	Admissible
North Carolina	Admissible	Admissible	Excludable
North Dakota	----------	Admissible	Admissible
Ohio	----------	Admissible	Admissible
Oklahoma	Admissible	Excludable	Excludable
Oregon	Admissible	Excludable	Excludable
Pennsylvania	----------	Admissible	Admissible
Rhode Island	----------	----------	Excludable
South Carolina	Admissible	Admissible	Admissible
South Dakota	Admissible	Excludable	Partially excludable
Tennessee	Admissible	Excludable	Excludable
Texas	----------	Excludable	Excludable

TABLE I.—*Admissibility, in state courts, of evidence illegally seized by state officers.*—Continued

State	*Pre-Weeks*	*Pre-Wolf*	*Post-Wolf*
Utah	----------	Admissible	Admissible
Vermont	Admissible	Admissible	Admissible
Virginia	----------	Admissible	Admissible
Washington	Admissible	Excludable	Excludable
West Virginia	Admissible	Excludable	Excludable
Wisconsin	----------	Excludable	Excludable
Wyoming	----------	Excludable	Excludable
	To admit—27	To admit—29	To admit—24
	To exclude—1	To exclude—18.	To exclude—26*
	Undecided—20.	Undecided—1.	Undecided—0.

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers.*

ALABAMA

Pre-Weeks: *Shields* v. *State*, 104 Ala. 35, 16 So. 85 (admissible).
Pre-Wolf: *Banks* v. *State*, 207 Ala. 179, 93 So. 293 (admissible).
Post-Wolf: Cf. *Oldham* v. *State*, 259 Ala. 507, 67 So. 2d 55 (admissible).
(Ala. Code, 1940 (Supp. 1955), Tit. 29, § 210, requires the exclusion of illegally obtained evidence in the trial of certain alcohol control cases.)

ARIZONA

Pre-Weeks: no holding.
Pre-Wolf: *Argetakis* v. *State*, 24 Ariz. 599, 212 P. 372 (admissible).
Post-Wolf: *State* v. *Thomas*, 78 Ariz. 52, 275 P. 2d 408 (admissible).

ARKANSAS

Pre-Weeks: *Starchman* v. *State*, 62 Ark. 538, 36 S. W. 940 (admissible).
Pre-Wolf: *Benson* v. *State*, 149 Ark. 633, 233 S. W. 758 (admissible).
Post-Wolf: *Lane, Smith and Barg* v. *State*, 217 Ark. 114, 229 S. W. 2d 43 (admissible).

CALIFORNIA

Pre-Weeks: *People* v. *Le Doux*, 155 Cal. 535, 102 P. 435 (admissible).

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*Alaska and Hawaii both hold illegally obtained evidence to be excludable although it does not appear that either has passed anew on this question since attaining statehood.

CALIFORNIA—Continued

Pre-Wolf: *People* v. *Mayen*, 188 Cal. 237, 205 P. 435 (admissible).

Post-Wolf: *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (excludable).

COLORADO

Pre-Weeks: no holding.

Pre-Wolf: *Massantonio* v. *People*, 77 Colo. 392, 236 P. 1019 (admissible).

Post-Wolf: *Williams* v. *People*, 136 Colo. 164, 315 P. 2d 189 (admissible).

CONNECTICUT

Pre-Weeks: *State* v. *Griswold*, 67 Conn. 290, 34 A. 1046 (admissible).

Pre-Wolf: *State* v. *Reynolds*, 101 Conn. 224, 125 A. 636 (admissible).

Post-Wolf: no holding.

DELAWARE

Pre-Weeks: no holding.

Pre-Wolf: *State* v. *Chuchola*, 32 Del. 133, 120 A. 212 (admissible).

Post-Wolf: *Rickards* v. *State*, 45 Del. 573, 77 A. 2d 199 (excludable).

FLORIDA

Pre-Weeks: no holding.

Pre-Wolf: *Ats* v. *Andrews*, 84 Fla. 43, 94 So. 329 (excludable).

Post-Wolf: *Byrd* v. *State*, 80 So. 2d 694 (Sub. Ct. Florida) (excludable).

GEORGIA

Pre-Weeks: *Williams* v. *State*, 100 Ga. 511, 28 S. E. 624 (admissible).

Pre-Wolf: *Jackson* v. *State*, 156 Ga. 647, 119 S. E. 525 (admissible).

Post-Wolf: *Atterberry* v. *State*, 212 Ga. 778, 95 S. E. 2d 787 (admissible).

IDAHO

Pre-Weeks: *State* v. *Bond*, 12 Idaho 424, 86 P. 43 (admissible).

Pre-Wolf: *State* v. *Arregui*, 44 Idaho 43, 254 P. 788 (excludable.)

Post-Wolf: no holding.

ILLINOIS

Pre-Weeks: *Siebert* v. *People*, 143 Ill. 571, 32 N. E. 431 (admisisble).

Pre-Wolf: *People* v. *Castree*, 311 Ill. 392, 143 N. E. 112 (excludable).

Post-Wolf: *City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N. E. 2d 504 (excludable).

INDIANA

Pre-Weeks: no holding.

Pre-Wolf: *Flum* v. *State*, 193 Ind. 585, 141 N. E. 353 (excludable).

INDIANA—Continued
Post-Wolf: *Rohlfing* v. *State*, 230 Ind. 236, 102 N. E. 2d 199 (excludable).

IOWA
Pre-Weeks: *State* v. *Sheridan*, 121 Iowa 164, 96 N. W. 730 (excludable).
Pre-Wolf: *State* v. *Rowley*, 197 Iowa 977, 195 N. W. 881 (admissible).
Post-Wolf: *State* v. *Smith*, 247 Iowa 500, 73 N. W. 2d 189 (admissible).

KANSAS
Pre-Weeks: *State* v. *Miller*, 63 Kan. 62, 64 P. 1033 (admissible).
Pre-Wolf: *State* v. *Johnson*, 116 Kan. 58, 226 P. 245 (admissible).
Post-Wolf: *State* v. *Peasley*, 179 Kan. 314, 295 P. 2d 627 (admissible).

KENTUCKY
Pre-Weeks: no holding.
Pre-Wolf: *Youman* v. *Commonwealth*, 189 Ky. 152, 224 S. W. 860 (excludable).
Post-Wolf: *Johnson* v. *Commonwealth*, 296 S. W. 2d 210 (Ct. App. Kentucky) (excludable).

LOUISIANA
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Fleckinger*, 152 La. 337, 93 So. 115 (admissible).
Post-Wolf: *State* v. *Mastricovo*, 221 La. 312, 59 So. 2d 403 (admissible).

MAINE
Pre-Weeks: *State* v. *Gorham*, 65 Me. 270 (admissible) (*semble*).
Pre-Wolf: *State* v. *Schoppe*, 113 Me. 10, 92 A. 867 (admissible) (*semble*).
Post-Wolf: no holding.

MARYLAND
Pre-Weeks: *Lawrence* v. *State*, 103 Md. 17, 63 A. 96 (admissible).
Pre-Wolf: *Meisinger* v. *State*, 155 Md. 195, 141 A. 536 (admissible).
Post-Wolf: *Stevens* v. *State*, 202 Md. 117, 95 A. 2d 877 (admissible). (Flack's Md. Ann. Code, 1951, Art. 35, § 5 requires the exclusion of illegally obtained evidence in the trial of most misdemeanors.)

MASSACHUSETTS
Pre-Weeks: *Commonwealth* v. *Dana*, 2 Metc. 329 (admissible).
Pre-Wolf: *Commonwealth* v. *Wilkins*, 243 Mass. 356, 138 N. E. 11 (admissible).
Post-Wolf: no holding.

MICHIGAN
Pre-Weeks: *People* v. *Aldorfer*, 164 Mich. 676, 130 N. W. 351 (admissible).

MICHIGAN—Continued

Pre-Wolf: *People* v. *Marzhausen*, 204 Mich. 559, 171 N. W. 557 (excludable).

Post-Wolf: *People* v. *Hildabridle*, 353 Mich. 562, 92 N. W. 2d 6 (excludable).

(Art. II, § 10 of the Michigan Constitution sets forth a limited class of items which are not excludable. See *People* v. *Gonzales*, 356 Mich. 247, 97 N. W. 2d 16.)

MINNESOTA

Pre-Weeks: *State* v. *Strait*, 94 Minn. 384, 102 N. W. 913 (admissible).

Pre-Wolf: *State* v. *Pluth*, 157 Minn. 145, 195 N. W. 789 (admissible).

Post-Wolf: no holding.

MISSISSIPPI

Pre-Weeks: no holding.

Pre-Wolf: *Tucker* v. *State*, 128 Miss. 211, 90 So. 845 (excludable).

Post-Wolf: *Nobles* v. *State*, 222 Miss. 827, 77 So. 2d 288 (excludable).

MISSOURI

Pre-Weeks: *State* v. *Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (admissible).

Pre-Wolf: *State* v. *Owens*, 302 Mo. 348, 259 S. W. 100 (excludable).

Post-Wolf: *State* v. *Hunt*, 280 S. W. 2d 37 (Sup. Ct. Missouri) (excludable).

MONTANA

Pre-Weeks: *State* v. *Fuller*, 34 Mont. 12, 85 P. 369 (admissible).

Pre-Wolf: *State ex rel. King* v. *District Court*, 70 Mont. 191, 224 P. 862 (excludable).

Post-Wolf: no holding.

NEBRASKA

Pre-Weeks: *Geiger* v. *State*, 6 Neb. 545 (admissible).

Pre-Wolf: *Billings* v. *State*, 109 Neb. 596, 191 N. W. 721 (admissible).

Post-Wolf: *Haswell* v. *State*, 167 Neb. 169, 92 N. W. 2d 161 (admissible).

NEVADA

Pre-Weeks: no holding.

Pre-Wolf: *State* v. *Chin Gim*, 47 Nev. 431, 224 P. 798 (admissible).

Post-Wolf: no holding.

NEW HAMPSHIRE

Pre-Weeks: *State* v. *Flynn*, 36 N. H. 64 (admissible).

Pre-Wolf: *State* v. *Agalos*, 79 N. H. 241, 107 A. 374 (admissible).

NEW HAMPSHIRE—Continued
Post-Wolf: *State* v. *Mara*, 96 N. H. 463, 78 A. 2d 922 (admissible).

NEW JERSEY
Pre-Weeks: no holding
Pre-Wolf: *State* v. *Black*, 5 N. J. Misc. 48, 135 A. 685 (admissible).
Post-Wolf: *Eleuteri* v. *Richman*, 26 N. J. 506, 141 A. 2d 46 (admissible).
(N. J. Rev. Stat. 33:1–62 provides for the return of items illegally seized in the investigation of certain alcohol control offenses.)

NEW MEXICO
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Dillon*, 34 N. M. 366, 281 P. 474 (admissible).
Post-Wolf: *Breithaupt* v. *Abram*, 58 N. M. 385, 271 P. 2d 827 (admissible).

NEW YORK
Pre-Weeks: *People* v. *Adams*, 176 N. Y. 351, 68 N. E. 636 (admissible).
Pre-Wolf: *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (admissible).
Post-Wolf: *People* v. *Variano*, 5 N. Y. 2d 391, 157 N. E. 2d 857 (admissible).

NORTH CAROLINA
Pre-Weeks: *State* v. *Wallace*, 162 N. C. 622, 78 S. E. 1 (admissible).
Pre-Wolf: *State* v. *Simmons*, 183 N. C. 684, 110 S. E. 591 (admissible).
Post-Wolf: *State* v. *Mills*, 246 N. C. 237, 98 S. E. 2d 329 (excludable).
(N. C. Gen. Stat. § 15–27 requires the exclusion of illegally obtained evidence.)

NORTH DAKOTA
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Fahn*, 53 N. D. 203, 205 N. W. 67 (admissible).
Post-Wolf: no holding.

OHIO
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Lindway*, 131 Ohio St. 166, 2 N. E. 2d 490 (admissible).
Post-Wolf: *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (admissible).

OKLAHOMA
Pre-Weeks: *Silva* v. *State*, 6 Okla. Cr. 97, 116 P. 199 (admissible).
Pre-Wolf: *Gore* v. *State*, 24 Okla. Cr. 394, 218 P. 545 (excludable).

OKLAHOMA—Continued

Post-Wolf: *Hamel* v. *State*, 317 P. 2d 285 (Okla. Crim.) (excludable).

OREGON

Pre-Weeks: *State* v. *McDaniel*, 39 Ore. 161, 65 P. 520 (admissible).

Pre-Wolf: See *State* v. *Laundy*, 103 Ore. 443, 204 P. 958 (excludable), although see *State* v. *Folkes*, 174 Ore. 568, 150 P. 2d 17 (not noticing *State* v. *Laundy*).)

Post-Wolf: *State* v. *Hoover*, 69 Ore. Adv. Sh. 715, — Ore. —, 347 P. 2d 69 (questioning *Laundy*).

PENNSYLVANIA

Pre-Weeks: no holding.

Pre-Wolf: *Commonwealth* v. *Dabbierio*, 290 Pa. 174, 138 A. 679 (admissible).

Post-Wolf: *Commonwealth* v. *Chaitt*, 380 Pa. 532, 112 A. 2d 379 (admissible).

RHODE ISLAND

Pre-Weeks: no holding.

Pre-Wolf: no holding.

Post-Wolf: *State* v. *Hillman*, 84 R. I. 396, 125 A. 2d 94 (applying common law rule, but noticing the enactment of the statutory rule).

(R. I. Gen. Laws, 1956, § 9–19–25 requires the exclusion of illegally obtained evidence.)

SOUTH CAROLINA

Pre-Weeks: *State* v. *Atkinson*, 40 S. C. 363, 18 S. E. 1021 (admissible).

Pre-Wolf: *State* v. *Green*, 121 S. C. 230, 114 S. E. 317 (admissible).

Post-Wolf: *State* v. *Anderson*, 230 S. C. 191, 95 S. E. 2d 164 (admissible).

SOUTH DAKOTA

Pre-Weeks: *State* v. *Madison*, 23 S. D. 584, 122 N. W. 647 (admissible).

Pre-Wolf: *State* v. *Gooder*, 57 S. D. 619, 234 N. W. 610 (excludable).

Post-Wolf: *State* v. *Poppenga*, 76 S. D. 592, 83 N. W. 2d 587 (excludable).

S. D. Code, 1939, § 34.1102 provides for a limited return to the common-law rule of admissibility. See *State* v. *Lane*, 76 S. D. 544, 82 N. W. 2d. 286.

TENNESSEE

Pre-Weeks: *Cohn* v. *State*, 120 Tenn. 61, 109 S. W. 1149 (admissible).

Pre-Wolf: *Hughes* v. *State*, 145 Tenn. 544, 238 S. W. 588 (excludable).

Post-Wolf: *Lindsey* v. *State*, 191 Tenn. 51, 231 S. W. 2d 366 (excludable).

TEXAS
Pre-Weeks: no holding.
Post-Wolf: *Chaplin* v. *State*, 107 Tex. Crim. 477, 296 S. W. 1095 (excludable).
Post-Wolf: *Williamson* v. *State*, 156 Tex. Crim. 520, 244 S. W. 2d 202 (excludable).
(Vernon's Tex. Stat., 1948 (Code Crim. Proc.,) requires the exclusion of illegally obtained evidence.)

UTAH
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Aime*, 62 Utah 476, 220 P. 704 (admissible).
Post-Wolf: no holding.

VERMONT
Pre-Weeks: *State* v. *Mathers*, 64 Vt. 101, 23 A. 590 (admissible).
Pre-Wolf: *State* v. *Stacy*, 104 Vt. 379, 160 A. 257 (admissible).
Post-Wolf: *In re Raymo*, 121 Vt. 426, 154 A. 2d 487 (admissible).

VIRGINIA
Pre-Weeks: no holding.
Pre-Wolf: *Hall* v. *Commonwealth*, 138 Va. 727, 121 S. E. 154 (admissible).
Post-Wolf: no holding.

WASHINGTON
Pre-Weeks: *State* v. *Royce*, 38 Wash. 111, 80 P. 268 (admissible).
Pre-Wolf: *State* v. *Gibbons*, 118 Wash. 171, 203 P. 390 (excludable).
Post-Wolf: *State* v. *Cyr*, 40 Wash. 2d 840, 246 P. 2d 480 (excludable).

WEST VIRGINIA
Pre-Weeks: *State* v. *Edwards*, 51 W. Va. 220, 41 S. E. 429 (admissible).
Pre-Wolf: *State* v. *Wills*, 91 W. Va. 659, 114 S. E. 261 (excludable).
Post-Wolf: *State* v. *Calandros*, 140 W. Va. 720, 86 S. E. 2d 242 (excludable).

WISCONSIN
Pre-Weeks: no holding.
Pre-Wolf: *Hoyer* v. *State*, 180 Wis. 407, 193 N. W. 89 (excludable).
Post-Wolf: *State* v. *Kroening*, 274 Wis. 266, 79 N. W. 2d 810 (excludable).

WYOMING
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *George*, 32 Wyo. 223, 231 P. 683 (excludable).
Post-Wolf: no holding.